

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CARTER G. PHILLIPS, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	KANNON K. SHANMUGAM, ESQ.	
7	As amicus curiae, supporting Petitioners	17
8	ORAL ARGUMENT OF	
9	ARTHUR R. MILLER, ESQ.	
10	On behalf of the Respondents	27
11	REBUTTAL ARGUMENT OF	
12	CARTER G. PHILLIPS, ESQ.	
13	On behalf of Petitioners	51
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 [10:02 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in case 06-484, Tellabs, Inc. versus Makor
5 Issues & Rights.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF PETITIONERS

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

11 In 1995 Congress acted decisively to curb
12 abusive private securities litigation. It took the
13 extraordinary step of rejecting categorically the
14 traditional rule of notice pleading in complaints that
15 are filed under the securities laws. Instead it
16 declared that, and this is at page 2 of our petition,
17 "The complaint shall state with particularity facts
18 giving rise to a strong inference that the defendant
19 acted with the required state of mind."

20 The fundamental error in the court of
21 appeals analysis in this case was in writing out of the
22 statute the strong inference language that Congress
23 clearly intended to be not only in those statutes, but
24 obviously applied rigorously.

25 JUSTICE KENNEDY: At some point during your

1 argument -- and I know you only have 20 minutes -- will
2 you tell me whether or not in your view the pleading
3 standard that the judge must follow is equivalent, is
4 the same as the instruction that's given to the jury?
5 Because if it isn't, then the Seventh Amendment argument
6 may have some more force.

7 MR. PHILLIPS: I think the answer to the
8 question is that it does not have to be the same. I
9 think Congress actually has greater authority in dealing
10 with pleadings that is distinct from the Seventh
11 Amendment right, but the Court doesn't need to go that
12 far in this particular case because I think the
13 inferences that we are asking the Court to draw from the
14 record in this case would avoid any --

15 JUSTICE KENNEDY: Well, in writing -- I take
16 it, so far as the jury, it's just whether it's more
17 likely than not, preponderance of the evidence.

18 MR. PHILLIPS: That's what the Court held --
19 held in Huddleston, yes, Your Honor.

20 JUSTICE KENNEDY: So your submission is,
21 maybe not in this case, but insofar as your theory of
22 the case, that the trial judge can, and in fact must
23 basically apply a standard of fact -- standard of proof
24 that's higher than that what the jury would.

25 MR. PHILLIPS: Well, it's important as a

1 standard of allegation, because what we're talking about
2 here is an analysis of the allegations of the lawyers,
3 and not any kind of an evidentiary showing by any of the
4 plaintiffs. So I do think it's removed. I mean, this
5 Court has really never addressed the issue of the extent
6 to which the Seventh Amendment extends to pleadings.
7 And I don't think this is the case in which to take up
8 that issue because I think it is quite clear that what
9 at least we're asking for as the appropriate
10 interpretation of the Reform Act is that you need to
11 apply -- that you simply follow *Matsushita* and *Monsanto*,
12 and that is to force the plaintiffs to demonstrate that
13 innocent explanations can be set aside. And if you take
14 that particular approach, which clearly is consistent
15 with the Seventh Amendment, then it seems to me you --
16 the Seventh that you followed under the Constitution, is
17 eliminated.

18 JUSTICE GINSBURG: Mr. Phillips, the Seventh
19 Amendment or not, the question in 12(b)(6) is has the
20 plaintiff stated a claim, and at the end of the line
21 it's has the plaintiff proved a claim. But you're
22 stating two different claims. The claim that must be
23 stated is a stronger claim than the claim that must be
24 proved, and I don't know of any other instance where
25 that is so.

1 MR. PHILLIPS: I don't know that there are
2 any other instances in which that's true,
3 Justice Ginsburg, but I don't think it's a
4 constitutional problem. I think at the end of the day
5 the question is, does Congress have the power to enforce
6 its view of the appropriate way to proceed as a matter
7 of policy at the pleadings stage, and I think the answer
8 to that question is yes. But again, you don't have to
9 --

10 JUSTICE GINSBURG: I wasn't asking it as a
11 matter of constitutional law but I'm thinking, how do
12 you construe these words, what is it, "strong
13 inference?" And the words come out of, as I understand
14 it, a Second Circuit decision. So I would think the
15 most logical thing is that you'd look at the Second
16 Circuit decision and say ah, Congress picked up those
17 words from the Second Circuit decision, then we should
18 pick up the standards that the Second Circuit applied.

19 But your definition of strong inference is
20 quite different from what the Second Circuit's was.

21 MR. PHILLIPS: Well, I'm not sure that's 100
22 percent true. I think the real problem with the Second
23 Circuit is there's no monolithic Second Circuit rule
24 that's out there. The Second Circuit applied a number
25 of cases under its particularity standards under 9(b)

1 prior to the time Congress adopted the strong inference
2 standard. Some of them -- I think we would be very
3 comfortable with the analysis in Shields versus
4 Citytrust Bank, for instance. The way Judge Jacobs
5 analyzed the complaint in that case is precisely the way
6 we're trying to analyze the complaint in this case. So
7 if you --

8 JUSTICE STEVENS: Mr. Phillips, can I ask
9 this question?

10 MR. PHILLIPS: I'm sorry.

11 JUSTICE STEVENS: One of the amicus briefs
12 talks in terms of the percentages, how likely the
13 inference, the word strong inference means 50 percent,
14 30 percent, 60 percent. Do you think the inference has
15 to be stronger or less strong than the inference of
16 probable cause in an affidavit for a search warrant to
17 get access to the privacy of a home and so forth?

18 MR. PHILLIPS: I think it would have to be
19 stronger than that, although I don't know how to
20 translate that into percentages, Justice Stevens.

21 JUSTICE STEVENS: A civil case would impose
22 a higher standard for getting discovery in a civil case
23 than they would for getting access to a citizen's
24 private papers and the like?

25 MR. PHILLIPS: I think the use of the

1 language "strong inference" carries with it a very
2 significant burden that has to be demonstrated by the
3 buyer.

4 JUSTICE KENNEDY: A burden of over 50
5 percent?

6 MR. PHILLIPS: Oh, to be sure.

7 JUSTICE SCALIA: In a criminal case, the
8 person seeking that action is a government officer who
9 presumptively is not acting out of selfish motives,
10 whereas we're talking about private suits and some
11 private litigants are selfish.

12 MR. PHILLIPS: Absolutely, Justice Scalia.
13 And if you read the Securities Industries amicus brief,
14 it ticks off all of the instances of harm that are
15 caused by allowing -- too much of the private litigation
16 is precisely that, which Congress was responding to.

17 JUSTICE KENNEDY: I just have to make it
18 clear. Is the high likelihood, or strong inference, is
19 greater than more likely than not?

20 MR. PHILLIPS: Yes. I believe Congress
21 would have intended it to be more --

22 JUSTICE ALITO: Doesn't the -- doesn't the
23 standard at the pleading stage have to be the same as
24 the standard at the summary judgment stage? If --
25 suppose that a certain set of facts is sufficient to

1 defeat summary judgment. If the plaintiff alleges all
2 of those facts in the complaint, are you saying that
3 that complaint could be dismissed even though supporting
4 those facts at the summary judgment stage would be
5 enough to defeat a summary judgment motion?

6 MR. PHILLIPS: I think at the end of the day
7 I would make that argument. I don't have to make that
8 argument here because it's clear to me that the same
9 standards of Matsushita and Monsanto that say you have to
10 exclude innocent explanations would apply at the summary
11 judgment stage as we're trying to apply at the pleading
12 stage, so there is no disconnect.

13 But if I were actually forced into that
14 position, I think I would take that view, although I
15 probably would argue first that the standard of
16 Huddleston ought to be reconsidered, rather than
17 rejecting clearly what Congress had in mind in 1995 when
18 it acted to curb the abuses of private securities
19 litigation.

20 JUSTICE SOUTER: But isn't the difference
21 between Matsushita and this particular case at least as
22 you are presenting this case, the -- the -- focused on
23 the strength of this exclusion of innocent conduct?

24 As, as I recall Matsushita, there -- there
25 had to be at that stage, there had to be evidence from

1 which one could infer that the -- that the conduct was
2 not innocent; but you're arguing for something stronger
3 than that. You're arguing for, in effect, an -- an
4 ultimate conclusion that excludes innocent conduct. And
5 aren't you asking for more than just what Matsushita did
6 at -- at that later stage?

7 MR. PHILLIPS: I think there may be a slight
8 semantic difference there, but the truth is at end of
9 the day all we're asking for the Court to do is to
10 evaluate the complaint, taking both the positive and the
11 negative inferences from it, excluding ambiguities,
12 interpreting them not in favor of the plaintiff, as you
13 traditionally do, take into account whether there is an
14 allegation of motive, and say at the end of the day
15 whether or not that reaches a -- rises to the level of a
16 strong inference.

17 JUSTICE SOUTER: But -- but Matsushita as I
18 recall did not require it to rise beyond the level of a
19 plausible inference. And I think you're arguing for
20 something stronger than that. And I think the language
21 of Congress forces you to do it but I -- I'm just
22 finding it difficult to conclude -- to equate the
23 plausibility standard in, in Matsushita with the strong
24 inference standard here. If you --

25 MR. PHILLIPS: Well, if I'm going to err on

1 either side, I obviously prefer that the Court carries
2 out Congress's intent. We think you needn't go any
3 further than Matsushita did in order to reverse the
4 court of appeals in this particular case.

5 Obviously there is probably some potential
6 distance between the two, where you could certainly
7 interpret the strong inference standard more in the line
8 the way the United States interprets it, as creating a
9 high likelihood of scienter. And we don't -- we're
10 certainly not objecting to that. We're just saying to
11 the Court that you needn't go that far in order to
12 decide this case, although obviously we would welcome a
13 ruling along those lines if the Court's inclined to go
14 that far.

15 JUSTICE GINSBURG: Is it fair to say at the
16 pleading stage it's the equivalent of a clear and
17 convincing standard, whereas at the end of the road it
18 would only be more probable than not?

19 MR. PHILLIPS: Well, again, I think it -- I
20 think it puts an issue -- and we raised this in our
21 reply brief, whether or not Huddleston should be
22 reconsidered in light of this sort of basic change in
23 the way Congress is approaching private securities
24 litigation. But, so my --

25 JUSTICE GINSBURG: So you do --

1 MR. PHILLIPS: There are a number of ways to
2 go at it. But if it turned out to be a disconnect, that
3 would not offend at least my sense of what Congress was
4 trying to achieve here.

5 JUSTICE SCALIA: Yeah. Well, I don't think
6 Congress was trying to achieve an alteration in the
7 ultimate standard, either, in the jury standard. What
8 it was concerned with is the enormous expense of -- of
9 discovery. And, and tried to set a high wall to get to
10 the discovery stage. I don't know why that should have
11 to affect or should logically affect the standard that
12 the jury is told to use.

13 MR. PHILLIPS: All I'm suggesting is that if
14 the Court were concerned that somehow there is a
15 disconnect between the pleading standard and the
16 ultimate standard of proof, the way to resolve that
17 incongruity -- if it is one -- would to be reconsider
18 the ultimate standard of proof, not to throw out the
19 clearly congressionally approved baby as part of that
20 bath water.

21 JUSTICE KENNEDY: Can you tell me a little
22 bit of how -- how this should work in your view? Assume
23 the CEO makes misstatements as to the earnings report
24 and the acceptance of one of its new products. Just
25 assume that.

1 MR. PHILLIPS: Right.

2 JUSTICE KENNEDY: Can we make a strong
3 inference that a CEO knows what his own earnings reports
4 are?

5 MR. PHILLIPS: You mean with a specific
6 earnings report rather than just simply sort of sales
7 projections and demand?

8 JUSTICE KENNEDY: Can we make a strong
9 inference that a CEO knows the status of current
10 earnings --

11 MR. PHILLIPS: Well, my guess is they --

12 JUSTICE KENNEDY: -- when he makes, when he
13 makes a statement.

14 MR. PHILLIPS: Well, I think they would have
15 to make an allegation that the -- that the CEO routinely
16 is provided with that information rather than simply
17 assume it. I think it's the same problem you have with
18 their -- with their allegation that it's common sense
19 that CEOs will act to protect their own personal self
20 interest and the overall welfare of the company by
21 misrepresenting the status of events.

22 JUSTICE SCALIA: How about just saying that
23 he knew it?

24 MR. PHILLIPS: I'm not --

25 JUSTICE SCALIA: Just saying that he knew

1 it. Without saying why they knew that he knew it?
2 You're saying they have to give a reason why they knew
3 that he knew it, namely he routinely read these reports?
4 Suppose they didn't say that. They just said knowing
5 that the -- that the figures were otherwise, he -- he
6 set them forth.

7 MR. PHILLIPS: I don't think that's
8 sufficient, because it requires for the facts that
9 particularly show --

10 JUSTICE BREYER: But suppose it says, which
11 I think it did say, that Mr. Notebaert typically stayed
12 on top of the company's financial health by having
13 weekly conversations with other executives. He had his
14 hands on the pulse of the company. He saw weekly sales
15 reports and product -- projection -- production
16 projections. Now it seems like an allegation that's
17 very specific.

18 MR. PHILLIPS: But the -- but the problem
19 with that allegation, and we're talking about the 6500,
20 the Titan 6500 product specifically, in that context,
21 the report is, there's nothing in there that says what
22 those reports say about the 6500. And remember, this is
23 a case where the plaintiffs have 27 whistleblowers
24 inside the company who could provide you with all of the
25 detail in the world; and yet when it comes time to tell

1 you what was in the 6500 report that would -- that would
2 suggest that it's not available, there's not word one in
3 the allegation.

4 JUSTICE BREYER: Well, I thought they
5 alleged at least that for about a year previously in
6 respect to the 506500 that it was wrong known throughout
7 the company that the 6500 had been delayed. Don't they
8 make an allegation like that?

9 MR. PHILLIPS: Right but that's -- that
10 being delayed for a year is not the basis for the claim.
11 The question was is the, is the 6500 being sold; and
12 that was the allegation. And the answer to that is he
13 -- I -- he had every reason to believe that, based on
14 what they've claimed because they've not produced a
15 report or said that there's anything inside the report
16 that says to the contrary about that.

17 Again, it seems to me --

18 JUSTICE BREYER: The 6500 has long been
19 delayed. Everyone knows that in the company. So he
20 knows it's long been delayed.

21 MR. PHILLIPS: I think --

22 JUSTICE BREYER: Then what he says is it is
23 being shipped and delivered. Something like that.

24 MR. PHILLIPS: But Justice Breyer, that --
25 that long been delayed period runs all the way back to

1 1998. And we're talking about events in 2000 and 2001.
2 So the notion that it's been long delayed says nothing
3 about what Mr. Notebaert was -- was revealing in March
4 and April and June of 2001.

5 It, it could potentially, but it equally, it
6 couldn't. It's the same problem you get with the 5500,
7 where the court of appeals specifically said it is quite
8 plausible that Mr. Notebaert never saw those reports.

9 Now how you can make that concession and
10 nevertheless say there is a strong inference that he
11 acted to deceive, strikes me as absolutely implausible.

12 JUSTICE BREYER: April '01, he says
13 everything we can build we are building, and shipping.
14 The demand is very strong. And then what they say is of
15 course nobody wanted any of it, it was long delayed, and
16 they've known that since 1998 and he has his finger on
17 the pulse of the company.

18 MR. PHILLIPS: But you -- you --
19 Justice Breyer, you make a leap there.

20 JUSTICE BREYER: Oh. Yeah.

21 MR. PHILLIPS: Is that they all knew that.
22 The point is they knew that it was delayed back in 1999.
23 What they don't do is tie that in to what he knew in
24 2001; and that, to me, that's the central point in this
25 case, is do you require that kind of specificity? And

1 it seems to me there's no other way to read what
2 Congress says in this statute than to that. I'd like to
3 reserve the balance of my time.

4 CHIEF JUSTICE ROBERTS: Thank you
5 Mr. Phillips.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAN,
8 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING PETITIONERS

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

12 While meritorious private actions are an
13 essential supplement to Government enforcement of the
14 securities laws, abusive action impose substantial costs
15 on companies and their shareholders. As a cornerstone
16 of its effort in the Reform Act to address the problem
17 of abusive actions, Congress adopted uniform and more
18 stringent pleading requirements including the strong
19 inference requirement at issue in this case.

20 The court of appeals erred by holding that a
21 plaintiff can satisfy that requirement simply by
22 alleging facts which an inference of state of mind could
23 be drawn. The court of appeals thereby misinterpreted
24 the Reform Act. And --

25 CHIEF JUSTICE ROBERTS: Do you have a

1 position on Justice Alito's earlier question about
2 whether the standard at the summary judgment stage is
3 the same as the standard at the pleading stage?

4 MR. SHANMUGAM: First of all to be clear,
5 Mr. Chief Justice, we don't believe that the Court needs
6 to address that question in this case, because we don't
7 believe that that sort of disparity would present any
8 Seventh Amendment concerns. However, if the Court does
9 believe that any disparity in the degree of probability
10 required does present Seventh Amendment concerns, we
11 believe that it is more consistent with Congress's
12 intent to apply the strong inference requirement at the
13 proof stage as well as the pleading stage rather than to
14 water down the strong inference requirement that
15 Congress adopted at the pleading stage.

16 And we believe that that requirement does
17 impose a very high burden. In our view, it requires a
18 plaintiff to allege facts that give rise to a high
19 likelihood that the conclusion that the defendant acted
20 with the necessary date of mind follows from those
21 allegations.

22 JUSTICE KENNEDY: And by the proof stage you
23 mean both summary judgment and submission to jury?

24 MR. SHANMUGAM: I think that that is right,
25 Justice Kennedy. I suppose that if the perceived

1 constitutional concern is solely regarding the degree of
2 likelihood that is required, it could be applied simply
3 at the summary judgment stage; but to the extent that
4 the Court believes that it is a matter for the jury to
5 determine whether a given set of facts gives rise to an
6 inference of the requisite strength then yes, the jury
7 would need to be instructed in a manner consistent with
8 the strong --

9 JUSTICE KENNEDY: What would you think about
10 the following --

11 JUSTICE STEVENS: May I just -- may I just,
12 very briefly. . Putting aside the constitutional
13 problem, do you think the standards are the same or
14 different between the pleading stage and the
15 constitutional stage -- and the summary judgment stage?

16 MR. SHANMUGAM: Well, again, we don't
17 believe that the Court needs to address that question.

18 JUSTICE STEVENS: I understand that. That's
19 not my question.

20 MR. SHANMUGAM: And the statute by its terms
21 only --

22 JUSTICE STEVENS: It is either a yes or no
23 question.

24 MR. SHANMUGAM: Well, I think that the
25 answer is yes if the Court feels it needs to address

1 that question. And to be sure, the strong inference
2 standard that Congress adopted was framed only in terms
3 of the pleading stage. And our view --

4 JUSTICE GINSBURG: -- there was a pleading
5 stage, I would like your clear view on how much that
6 changes. It has been the understanding that when there
7 is a 12(b)(6) motion, you look only to the face of the
8 complaint and you construe the allegations in that
9 complaint in the light most favorable to the plaintiff.

10 Is that rule not applied under the
11 interpretation you are giving us of strong inference?

12 MR. SHANMUGAM: I think that it is,
13 Justice Ginsburg, to this limited extent. In an
14 ordinary civil case, the case is governed of course by
15 Rule 8. And in some sense the rule that the allegations
16 in the complaint must be construed in the light most
17 favorable to the plaintiff is really derived from Rule 8
18 and its requirement that a plaintiff need only provide a
19 shortened claim statement of the relevant underlying
20 facts in order to survive a motion to dismiss.

21 What Congress did in the Reform Act was to
22 require first of all some degree of particularity in
23 allegation; but Congress went further than that; and to
24 the extent that Congress spoke in terms of the
25 inferences that can be drawn from those allegations, we

1 do believe that Congress abrogated the background rule
2 that the allegations must be read in the light most
3 favorable to the plaintiff, or as some courts have put
4 it, that all reasonable inferences that can be drawn
5 from the complaint should be drawn in the plaintiff's
6 favor.

7 That clearly is a change on the preexisting
8 law; and it is a change with regard to the law that
9 circuits were applying before the enactment of the
10 Reform Act.

11 JUSTICE SOUTER: Why don't we simply assume
12 that the read most favorable to the plaintiff rule is
13 still in place, but that reading it most favorably to
14 the plaintiff, it must rise to the level of supporting
15 the strong inference?

16 MR. SHANMUGAM: I guess, Justice Souter,
17 that I would wonder what it would mean to say that you
18 read the allegations in the light most favorable to the
19 plaintiff. If what it means is that a plaintiff can
20 simply accumulate reasonable subsidiary inferences in
21 order to create the strong inference of state of mind
22 that is ultimately required, then I think I would
23 disagree that that rule remains in effect. Precisely
24 because our view is that in applying the strong
25 inference standard, a court should consider other

1 possible explanations for the defendant's conduct that
2 are not foreclosed by the allegations --

3 JUSTICE SOUTER: Well, but I was using the
4 word inference to -- to refer to some reasoning process
5 based upon what is stated. Not on assumptions favorable
6 to the plaintiff.

7 And if inference is to tie -- is, is a term
8 that is tied to what is alleged, then I don't see any --
9 any contradiction between reading those allegations most
10 favorably, but saying the statute in each statute
11 requires that the -- that the total force of the
12 inference rise to the level of strength that you speak
13 of.

14 MR. SHANMUGAM: I think our only concern,
15 Justice Souter, would be that where a plaintiff includes
16 ambiguous allegations in the complaint, a court should
17 consider the possibility that those ambiguities work to
18 the defendant's favor as well as working to the
19 plaintiff's favor. And one concrete example of that in
20 this case are the allegations that concern the Titan
21 5500. There are allegations in this case that there was
22 a study and there were various internal reports that
23 indicated that demand for that product was declining.

24 But the complaint does not specifically
25 allege that that study and those internal reports were

1 even available at the time the CEO made the alleged --

2 JUSTICE SCALIA: Mr. Shanmugam, could --

3 could I get you back to -- to your, your assertion of we
4 don't have to reach in this case the question of whether
5 the same standard applies at trial as, as at the
6 pleading stage?

7 It seems to me a Seventh Amendment claim has
8 been raised. It's our usual policy to avoid unnecessary
9 constitutional adjudication. If indeed the two
10 standards are the same, there's certainly no Seventh
11 Amendment problem. So why don't we have to first of all
12 decide, in resolving the Seventh Amendment claim,
13 whether the two standards are the same?

14 MR. SHANMUGAM: Well, that is certainly
15 correct, Justice Scalia, but in our view, there is no
16 constitutional problem here. And the reason that there
17 is no constitutional problem here is in making the
18 probabilistic determination that is required by the
19 Reform Act, a court is taking the allegations in the
20 complaint as true. It is not engaging in any weighing
21 of the evidence.

22 JUSTICE SCALIA: But you're getting to the
23 merits of the constitutional problem. And we usually
24 run away from constitutional problems. We don't even
25 want to consider the merits of it. And we don't have

1 to, if indeed the two standards are the same.

2 MR. SHANMUGAM: Well, to the extent that the
3 Court views the constitutional issue in this case as
4 sufficiently substantial to trigger the canon of
5 constitutional avoidance, then we do believe that the
6 better view, the view that is more consistent with
7 Congress's intent, is that if the Court is choosing
8 between raising the standard at the pre stage and
9 watering down the standard at the pleadings stage, we
10 believe that the former is more consistent with
11 Congress's --

12 JUSTICE ALITO: Even if there is no Seventh
13 Amendment problem, what sense would it make to have a
14 regime that says plaintiff has to plead more than the
15 plaintiff has to show at summary judgment or prove at
16 trial.

17 MR. SHANMUGAM: Well, Congress was
18 concerned, Justice Alito, with the problem of abusive
19 pleading. That much is crystal clear. And as part of
20 that concern, Congress was concerned that plaintiffs
21 could readily allege fraud by hindsight, and Congress
22 may have been concerned that the plaintiff could do so
23 not only by making a conclusory allegation of state of
24 mind, but also making a slightly less conclusory
25 allegation of state of mind by alleging facts that

1 merely give rise to a reasonable inference of state of
2 mind.

3 If Congress hadn't had that concern, it
4 obviously could have codified the reasonable inference
5 standard that was then in use by a number of other
6 courts.

7 JUSTICE BREYER: What do you think in
8 writing this opinion? There are a couple of ways. One,
9 you can find strong inference in terms of some other
10 words. Two, you could look to history. Or three, you
11 could just try an example. Say strong inference means
12 strong inference. Here's an example. This is a
13 complaint. It meets it, or it doesn't meet it. Which
14 way, in your opinion, will work best in this case?

15 MR. SHANMUGAM: Justice Breyer, our primary
16 concern in this case is with the way that the Court of
17 Appeals articulated the applicable standard, which we
18 believe may have pernicious effects in future cases.
19 And so we certainly believe that it would be appropriate
20 for the Court to vacate and remand for the Court of
21 Appeals to apply the correct standard. But just to be
22 clear --

23 JUSTICE GINSBURG: You said the Court of
24 Appeals to apply it. Could the Court of Appeals
25 applying the standard that you say is correct come to

1 the same decision that it came to using a different
2 verbal formula.

3 MR. SHANMUGAM: In our view,
4 Justice Ginsburg, applying the correct standard, the
5 decision of the Court of Appeals in this case should be
6 reversed. And if the case were remanded to the Court of
7 Appeals for application of the standard, we certainly
8 think that the Court of Appeals should come out the
9 other way.

10 JUSTICE BREYER: You had something else to
11 say in answer to my question, which I would like to
12 hear.

13 MR. SHANMUGAM: I think it was just that
14 point, Justice Breyer, namely, that if the Court
15 believes that it would be useful to provide guidance to
16 the lower courts by applying the standard itself in this
17 case, we do believe that the decision of the Court of
18 Appeals should be reversed rather than vacated.

19 JUSTICE KENNEDY: Is the requisite standard,
20 knowledge of falsity.

21 MR. SHANMUGAM: The requisite scienter is
22 either intent or recklessness, with regard to the
23 underlying conduct at issue, in effect --

24 JUSTICE KENNEDY: Intent to make a false
25 statement?

1 MR. SHANMUGAM: Yes, that's right. And in
2 fact, in misstatement cases, that is knowledge of
3 falsity.

4 CHIEF JUSTICE ROBERTS: Thank you
5 Mr. Shanmugam.

6 Mr. Miller.

7 ORAL ARGUMENT OF ARTHUR R. MILLER

8 ON BEHALF OF RESPONDENTS

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

11 We believe the Seventh Circuit had it right.
12 We believe that what the Seventh Circuit, and this is in
13 partial response to you, Justice Breyer, is take more or
14 less a holistic view of the entirety of the complaint.
15 The business about the 5500, the business about the 6500
16 not being available when on December 11, 2000, Notebaert
17 says it's available, the fact that they weren't shipping
18 it, they weren't selling it, it didn't work, and the
19 extensive information from confidential sources that
20 there were, as one judge once referred to it, accounting
21 shenanigans going on, designed to shift income into the
22 fourth quarter of 2000.

23 We think that when the court looked at that,
24 it said, looks to us as if there's --

25 JUSTICE KENNEDY: Do we take judicial notice

1 that a CEO knows these things and that's the strong
2 inference.

3 MR. MILLER: Again, you have confidential
4 sources in this case, and in the case, Notebaert is
5 hands on, he's talking to people, he's on the phone all
6 the time. We're talking about the 5500 --

7 JUSTICE KENNEDY: But you agree you have to
8 have that? You have to have some specific allegation to
9 show of his knowledge? We can't just infer that?

10 MR. MILLER: I would think you should be
11 able to infer it with the CEO. I think the confidential
12 sources demonstrate in this case, he must have had it,
13 given his nature, the status of these products, his
14 day-to-day --

15 JUSTICE BREYER: The most suspicious thing
16 in the complaint that I could find was where you say
17 there's an internal market report, and it revealed
18 demand for the 5500 was drying up, and revenue would
19 decline by 400,000,000. Then you date that with in or
20 about early '01. Now, I think if you knew or had reason
21 to believe that it was prior to March or April of '01,
22 you would have said so.

23 MR. MILLER: If we knew.

24 JUSTICE BREYER: Yeah, and therefore,
25 there's quite a good chance here that this report was

1 written after he made the statements.

2 What am I supposed to do with that? I mean,
3 I know what you said. And you said your best. And
4 that's your best.

5 MR. MILLER: Yes. This notion of strategic
6 ambiguity is in a sense humorous, given the obstacles
7 that a plaintiff has to get the goods, so to speak.
8 Just think about the investigation efforts that went
9 into this case. What you do, Justice Breyer, is -- and
10 I think this is what the Seventh Circuit did -- look at
11 everything, look at the fact that you have got
12 confidential sources saying 5500 demand is drying up,
13 perhaps as early as middle 2000. Parts are not being
14 ordered. People are going home early. Verizon dropped
15 25 percent, fourth quarter. Verizon dropped 50 percent
16 in January.

17 You're the CEO. You don't know that your
18 flagship product is drying up? That there's inventory,
19 that people are going home? That your best customer
20 doesn't know you anymore?

21 CHIEF JUSTICE ROBERTS: You're arguing the
22 facts and the inferences. You said the Seventh Circuit
23 got it right. As I read their articulation of the
24 standard on page 20A of the petition appendix, it's the
25 normal standard that would have been applied prior to

1 the passage of the PSLRA. Could a reasonable person
2 infer -- Congress passes a law saying they've got to
3 give rise to a strong inference. Shouldn't that have
4 changed the standard?

5 MR. MILLER: We believe two propositions.
6 Number one, you can't exceed the Seventh Amendment, and
7 the Seventh Circuit --

8 CHIEF JUSTICE ROBERTS: I don't understand
9 the Seventh Amendment argument here. Congress can
10 surely articulate the standard that's going to be
11 applied as a matter of substantive law. If Congress
12 says, you have to prove by clear and convincing
13 evidence, that doesn't interfere with the Seventh
14 Amendment because a jury would be instructed pursuant to
15 that standard.

16 MR. MILLER: That is correct, Chief Justice.
17 But that is not what Congress did. Congress did not
18 elevate the burden of proof. That is why Mr. Phillips
19 has asked you to, in effect, to overrule Huddleston.

20 JUSTICE SCALIA: Well, but Congress just
21 established an entry qualification for getting into
22 court.

23 And there are a lot of entry qualifications.
24 In diversity cases, you -- if you allege diversity, and
25 it existed at the outset, that's fine. That doesn't

1 have to be proved at the end of the case. Indeed even
2 if you prove the contrary, the case is still validly
3 there. Congress can establish entry requirements even
4 when they differ from, or have indeed nothing to do with
5 the merits that the jury is supposed to decide.

6 MR. MILLER: I think that is absolutely
7 correct, and indeed rule 9(b) has been an entry
8 qualification since 1938. But there are entry
9 qualifications, and there are entry qualifications.

10 In this case, in effect, the motion to
11 dismiss operates as a dispositive motion. It cuts off
12 the ability to proceed at all, and it does it, if you
13 listen to the standards being proposed by Petitioner,
14 and by the United States --

15 JUSTICE BREYER: What's the difference
16 between what Justice Scalia was just saying? You can't
17 come into Federal court unless you have at least
18 \$200,000 damages. Now, you might have been just as much
19 hurt if you had less, but that would be constitutional.
20 So here you can't get into Federal court unless you have
21 a really strong claim, an overwhelming claim that you
22 have to demonstrate at the beginning.

23 Now, you might have a good claim, but we're
24 not going to let you come into Federal court. We only
25 want those people who are really strong, just as we only

1 want those people who are really suffering.

2 MR. MILLER: And did Congress raise the
3 burden --

4 JUSTICE BREYER: No. No, not the burden
5 of -- it's the entry.

6 MR. MILLER: The entry points you referred
7 to, the so-called pleas in abatement, to put on my
8 common law hat, a jurisdiction venue, et cetera, they
9 may raise issues of fact and Congress, in control of the
10 Federal courts, can calibrate it any way they want.

11 But when you are dealing with the core
12 function of the jury -- and matters of abatement were
13 never considered to be core functions of the jury -- I
14 think a whole range of cases starting with *Slocum* versus
15 *New York Life* --

16 CHIEF JUSTICE ROBERTS: I thought you told
17 me that Congress could set a high level of burden on
18 factual issues, and that that wouldn't intrude upon the
19 Seventh Amendment.

20 MR. MILLER: I'm distinguishing, Mr. Chief
21 Justice, between the merits and the entry point.

22 CHIEF JUSTICE ROBERTS: Are you saying that
23 Congress can not set a fact burden on the merits that is
24 different than preponderance of the evidence.

25 MR. MILLER: No. No. No. No. If Congress

1 wants to change preponderance to clear and convincing,
2 it can.

3 JUSTICE KENNEDY: So you would say that you
4 could have a beyond reasonable doubt standard that must
5 be met at the pleading level, but more likely than not
6 at the jury level?

7 MR. MILLER: No. That is something I
8 disagree with. If the substance of the law --

9 JUSTICE KENNEDY: We want to know what the
10 rule is.

11 MR. MILLER: I'm not sure it's the rule.
12 It's what I would advocate. If the substance says
13 predominance, then to raise the pleading bar on what in
14 effect is a dispositive motion -- and I don't think it
15 makes any difference whether it's a JNOV, a directed
16 verdict, a summary judgment, motion for judgment on the
17 opening statement -- and you decided all of those cases.
18 And you protected what Justice Souter referred to in
19 Markman as the core function of the jury. You have
20 always said these procedures are okay, as long as it
21 does not call for the resolution of fact issues, because
22 that's the core function of the jury.

23 Now this Court is faced with, in effect,
24 coming back down that time line to the motion to
25 dismiss.

1 CHIEF JUSTICE ROBERTS: If I'm with you so
2 far, why would you suppose that Congress would create a
3 different standard on the motion to dismiss than they
4 meant to apply at the merits standard?

5 MR. MILLER: I don't think Congress would.
6 I do not believe Congress ever intended -- it's not in
7 the statute, it is not in the legislative history, it is
8 not in any case, Matsushita, Monsanto are unique
9 antitrust cases, and in both cases, the Court, if you
10 read the opinions fully, protected the jury function.
11 They said there was simply nothing beyond the assertions
12 standing alone when you have competitive and
13 anticompetitive conduct to protect substantive antitrust
14 law. That doesn't do it.

15 CHIEF JUSTICE ROBERTS: Well, then what was
16 Congress trying to do when they said strong inference?
17 It seems to me that if you think the standards have to
18 be the same at pleading and at proof, and Congress says
19 strong inference at pleading, it means you have to show
20 a strong inference at proof, and that's why there's no
21 Seventh Amendment problem.

22 MR. MILLER: What you have to show at proof
23 is preponderance.

24 JUSTICE STEVENS: Then it seems to me that
25 you have the meaning of strong inference and reasonable

1 inference.

2 MR. MILLER: Our standard, as proposed, and
3 we think --

4 JUSTICE STEVENS: You don't want to answer
5 yes or no there?

6 MR. MILLER: -- is reasonable jurors, who
7 are finders of fact, could find by a preponderance of
8 the evidence that the defendants acted with scienter.

9 JUSTICE STEVENS: So you're saying those
10 words, strong inference, mean essentially the same thing
11 as reasonable inference.

12 MR. MILLER: No. You can have lots of
13 reasonable inferences that don't meet a preponderance
14 notion.

15 JUSTICE BREYER: That's true, but imagine a
16 case where the plaintiff with tremendous candor sets
17 forth every bit of testimony that's going to be heard on
18 both sides.

19 And then you read that document and you
20 conclude this is the weakest case I've ever heard, but I
21 do think a reasonable juror could find for the
22 plaintiff.

23 And that would be the weak evidence
24 standard.

25 And lo and behold, that could be -- you

1 know, what do we do about that? Because using your do
2 you send it to a jury test, we could easily imagine
3 cases where that meets the weak evidence standard, the
4 weak inference and not the strong inference. And what
5 I'm driving at is, I don't see a way of avoiding this
6 Seventh Amendment problem.

7 MR. MILLER: If --

8 JUSTICE BREYER: Because they certainly
9 didn't intend the weak inference standard.

10 MR. MILLER: If you follow petitioners in
11 their attempt to deconstruct not simply Rule 8's
12 construction, but hundreds of years of what this Court
13 in Jones versus Bock referred to as usual procedural
14 practices which are not to be lightly departed from, the
15 historic notion is you look at the complaint and in a
16 curious way, you have blinders on. You look at the
17 complaint. You read it in the light favorable to the
18 pleader. You do not weigh. That is a jury function.
19 You do not look for exculpatory explanations.

20 JUSTICE ALITO: How can you assess the
21 strength of the inference that can be drawn from the
22 facts alleged in the complaint without considering all
23 the inferences that could be drawn from those facts? I
24 just don't understand that argument.

25 You see somebody -- let's say you saw

1 somebody today walking east on Pennsylvania Avenue in
2 the direction of Capitol Hill. Now you -- there's --
3 you could draw an inference that the person is coming to
4 the Supreme Court. And if there were no other building
5 in Washington, that would be a very strong inference.
6 But don't you also have to consider the inference that
7 the person is going to the Capitol, the person is going
8 to the Library of Congress, the person is going to some
9 other location up here? You have to consider all the
10 inferences that you can draw from the facts.

11 MR. MILLER: As the Seventh Circuit did, we
12 agree, you look at the totality of the complaint.
13 That's a given.

14 But there are contrary inferences that
15 undermine the strength of the plaintiff's inferences.
16 They weaken it. And they're -- they emanate from the
17 complaint.

18 There are other kinds of inferences, let's
19 call it nonculpability, that don't denigrate the strong
20 inference which let's assume hypothetically has been
21 established. They're just side-bar possibilities.

22 JUSTICE GINSBURG: Well, let's take one
23 specific example that the petitioners did, and that is
24 this matter of the channel stuffing. They say here's a
25 notion, channel stuffing. It could mean goods were

1 shipped that nobody ever ordered, or it could mean
2 something different. It could mean discounting and
3 other incentives to get people to buy. So there's good
4 channel stuffing and bad channel stuffing, and it sounds
5 like good cholesterol, bad cholesterol; you can't tell
6 from the allegations that it's the bad stuffing that's
7 at issue.

8 MR. MILLER: The Seventh Circuit reached
9 that conclusion, I think, by looking at some of the
10 confidential sources which sort of indicated that there
11 was channel stuffing in the sense of pushing product out
12 which was coming back. The head of Verizon complained
13 about the channel stuffing, so there's reason to believe
14 that at least some of it is bad. Just enough.

15 Now, is that in and of itself determinative?
16 No. Again, I come back to the notion that what the
17 Seventh Circuit did is look at the 5500, look at the
18 6500, look at the earnings projections which proved
19 false, looked at back-dating, channel stuffing. Looked
20 at all of that and said okay, even if I treat channel
21 stuffing as weak, I have these other things. And as
22 Judge Lynch of the First Circuit said, each fact of
23 science is like a brush stroke.

24 JUSTICE SOUTER: Are you entitled to
25 consider the brush strokes that are not there as well as

1 the subsidiary brush strokes that are? In
2 Justice Alito's example, if the pleadings don't point
3 out that the Library of Congress and the Capitol are
4 also up on this hill, is the judge at the motions stage
5 entitled to consider that?

6 MR. MILLER: Obviously, if it's something
7 you can take judicial notice of, then yes.

8 JUSTICE SOUTER: Okay. Then that is
9 engaging in something more than construing the pleadings
10 most favorably to the plaintiff.

11 MR. MILLER: But it's within the realm of
12 what courts have done for the longest of the time. They
13 look at documents attached. They look at judicial
14 notice.

15 JUSTICE SOUTER: What do you think about
16 that? There are at least some circumstances, then, in
17 which there this is kind of critical assessment function
18 that you concede must go on, rather than simply a piling
19 favorable inference onto favorable inference to see if
20 it gets to the strong points.

21 MR. MILLER: I repeat what I said a couple
22 of minutes ago, Justice Souter. If the negative
23 depletes the affirmative, if there's a correlation
24 between them, I can understand that. Maybe it
25 eliminates that fact. Maybe it reduces that fact.

1 But when we hear about motive, what does
2 motive and guidance reduction months after the false
3 statements have to do with whether the statements were
4 false, whether the 5500 was --

5 JUSTICE SOUTER: That is -- that is an
6 argument for the weight of considering motive rather
7 than the relevance of the motive consideration per se.

8 MR. MILLER: I think it is a tough line. I
9 think this is the kind of line district judges have to
10 draw. I think if you look at your own precedents like
11 Anderson versus Liberty Lobby and all of those jury
12 trial cases, you see the repetition of the notion that
13 judges do not balance inference chains on a matter going
14 to the core function of a jury.

15 CHIEF JUSTICE ROBERTS: But all of those
16 cases were before the PSLRA where Congress, it seems to
17 me, established a very different standard. They said
18 they have to support a strong inference.

19 MR. MILLER: A strong inference. Not a
20 conclusive inference.

21 CHIEF JUSTICE ROBERTS: Strong inference was
22 not the test that was being applied in Anderson, Liberty
23 Lobby, in any of those cases.

24 MR. MILLER: But can't -- but strong
25 inference, as Justice Ginsburg said much earlier, was

1 the standard not only in the Second Circuit but in the
2 First Circuit and in the Third Circuit.

3 JUSTICE BREYER: What do you think about the
4 approach -- because I have had some of these cases. And
5 I see -- I think words, words, words.

6 And what Congress said was strong inference,
7 and we're not going to get any further by looking for
8 some other words. So therefore, take strong inference.
9 The most helpful thing is take it, look at the
10 complaint, read it, and then say okay, this is a strong
11 inference. Or maybe we'd say it isn't. We read it, and
12 avoid all the other issues. What do you think about
13 that?

14 MR. MILLER: Live to fight another day?

15 JUSTICE SCALIA: Right. And then on appeal,
16 we would say, no, it's not a strong inference, or yes,
17 it is a strong inference.

18 I mean, I hope we're going to establish some
19 standards for how you go about determining whether
20 there's a strong inference or not.

21 JUSTICE KENNEDY: And I hope we're going to
22 recognize that Congress thought it was doing something.
23 Your argument so far, Professor, doesn't indicate
24 that Congress --

25 MR. MILLER: Excuse me.

1 JUSTICE KENNEDY: You indicated that the --
2 you know, the plaintiff had to do all this
3 investigation. The whole point of this was that the
4 defendants were being disadvantaged.

5 MR. MILLER: Look at the statute in its
6 entirety. This isn't a statute that just deals with
7 pleading scienter. Look at the provisions dealing with
8 the selection of lead representative, which has produced
9 this incredible shift from '95 to public institutions,
10 pensions and labor unions. They don't bring frivolous
11 cases. Look at the control that statute gives over
12 selection of them with notice provisions to make sure
13 you've got the --

14 CHIEF JUSTICE ROBERTS: How does that change
15 how we should read strong inference in the statute? Are
16 you saying don't worry whether it's a strong inference
17 or not because labor unions are bringing the cases and
18 they're not going to bring a frivolous case? No.
19 Congress said there has to be a strong inference. And
20 what concerns me is that the very standard that the
21 Seventh Circuit articulated said simply could a
22 reasonable person infer. The notion of strong inference
23 isn't in that standard at all.

24 MR. MILLER: The notion of strong inference
25 starting with the Second Circuit doctrine, as used in

1 many other circuits, was actually a much lower standard
2 than what we are recommending.

3 If I believe -- if I think back at
4 Greenstone, it was reason to believe, or tends to
5 believe, or circumstantial evidence in Greenstone and in
6 Burlington Coat.

7 Under our standard of preponderance, the
8 ability to find preponderance, you are elevated. You
9 are also elevated by the preceding subdivision which
10 requires a level of particularization, never known in
11 Federal Rule --

12 JUSTICE STEVENS: Mr. Miller, going back
13 just to the word strong, forgetting the
14 particularization from it, do you think you can
15 categorize the strength in percentage terms? They have
16 to be more than 50 percent? More than probable cause?

17 We're talking all abstractly here and I find
18 it easier to think when I think about numbers.

19 MR. MILLER: I have -- forgive me. I
20 haven't seen a judicial opinion that says at the 33 and
21 one-third percentage of probability, I've got to give it
22 to the jury, because that jury might file for my --

23 JUSTICE SCALIA: I think it's 66 and
24 two-thirds. I think that is --

25 (Laughter.)

1 MR. MILLER: Is that because you never met a
2 plaintiff you really liked?

3 (Laughter.)

4 JUSTICE STEVENS: At least we know that in
5 the probable world --

6 MR. MILLER: I took a liberty there with the
7 Justice. I don't think you can ascribe a percentage to
8 it. I think --

9 JUSTICE KENNEDY: Well, I think more likely
10 than not, most people think of 49, 50 percent. Can you
11 tell us whether strong inference is stronger than more
12 likely than not?

13 MR. MILLER: I do not believe it is. I
14 think --

15 I think strong inference -- if we're doing
16 the numbers game -- may actually be 40 percent. If a
17 district judge is looking, again, I say at the entirety
18 of discounts --

19 JUSTICE STEVENS: Let me just reclaim the
20 question. Is it stronger or weaker than probable cause
21 in a criminal context?

22 MR. MILLER: Oh, I would hope it's stronger.
23 I would hope it's higher than probable cause.

24 JUSTICE SCALIA: What about clear and
25 convincing? Is it below clear -- I mean, they are the

1 only two standards I actually understand. Without
2 picking a number out of air, is preponderance, I think I
3 can figure that out. And I guess I can figure out
4 beyond a reasonable doubt. But other than those, when
5 you talking about strong, when you talk about clear and
6 convincing, I have no idea what those things mean.

7 Do you?

8 MR. MILLER: And --

9 JUSTICE SCALIA: You don't think they mean
10 anything?

11 MR. MILLER: No, I think they mean what a
12 district judge honoring his Article III commission
13 concludes after an intensive evaluation of the entirety
14 of the complaint, looking for that strong inference,
15 putting on his sort of motion to dismiss 12(b)(6) hat,
16 says okay --

17 CHIEF JUSTICE ROBERTS: Just okay?

18 MR. MILLER: No, I did not mean that. Don't
19 take me literally on that. For heavens sakes, I'm from
20 Brooklyn. I'm very colloquial. I'm very sorry about
21 that.

22 JUSTICE SCALIA: Let me write that down. We
23 should not take you literally. All right.

24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Okay, you two are

1 even now.

2 (Laughter.)

3 MR. MILLER: Understand, you keep asking,
4 quite properly obviously, how does strong inference
5 change anything?

6 The test we have proposed and the test I
7 believe the Seventh Circuit applied is not the classic
8 12(b)(6) have you stated a claim, because we all know at
9 least traditionally, under notice pleading, you can
10 march through that.

11 This test, if you follow that time line
12 backward, is in effect asking that district judge to
13 make a decision on looking at the totality of this
14 complaint, is this case trial worthy? It's a curious
15 thing. I don't envy district judges who have to do
16 this.

17 Is it trial worthy? Why would Congress say,
18 if a district judge is willing to say under the classic
19 test, I think it's trial worthy, there's no reason to
20 believe that Congress wanted to cut that case off.

21 CHIEF JUSTICE ROBERTS: Trial worthy under
22 preponderance standard or trial worthy under the strong
23 inference standard?

24 MR. MILLER: Oh, I think he is becoming
25 slightly schizoid, he is saying, I'm looking at strong

1 inference. I'm looking at the motion to dismiss
2 structure as it's been, the usual procedure, 200 years,
3 and I have to make a judgment because Congress was
4 pushing here. There's no doubt about it.

5 I have to make a decision on the basis of
6 what I've got, which is virtually nothing -- let's face
7 that -- I think -- I think if these allegations are
8 proven, it is certainly trial worthy.

9 JUSTICE KENNEDY: It sounds to me like --

10 JUSTICE STEVENS: It's not trial worthy, but
11 rather discovery worthy.

12 CHIEF JUSTICE ROBERTS: I'm sorry.

13 Justice Stevens, say it again.

14 JUSTICE STEVENS: I think the question is
15 not whether it's trial worthy, it's whether it's worthy
16 for discovery. That's really what's at issue in this.

17 MR. MILLER: Well, the realities out there
18 are they built a wall. They put in all of these
19 procedural protections and they said no discovery until
20 you climb the wall. Now what kind of a wall was it?
21 Was it a Dutch dike or the Berlin Wall? If you look at
22 that statute, contrary to what Mr. Phillips urges, there
23 are multiple policies expressed in that statute, one of
24 which is, private cases are good. Let's just get the
25 right people to run those private cases. Let's control

1 them. Let's, let's have a greater threshold, but let's
2 not throw the baby out with the bath water. Because
3 everybody seems to agree private cases help.

4 JUSTICE KENNEDY: I want, I want to be fair.
5 I interpreted your argument -- and please tell me if
6 this is incorrect -- as indicating that if I think
7 strong inference is greater, more onerous than more
8 likely than not, at the pleading stage, I then also have
9 to say this is the instruction that must be given to the
10 jury? In order to avoid the, the discontinuity between
11 the pleading stage and what --

12 MR. MILLER: The way you state it, Justice,
13 is something very hard for me to respond to. Congress
14 did not change the persuasiveness, the proof burden. If
15 you go through the statute, you will see spots where
16 they did. Congress knew how to change proof standards.
17 Congress knew how to change Federal rules.

18 Congress did not change the proof in private
19 actions. Congress did not change all of the background
20 procedure like the background procedure in Jones and --
21 it is just not there yet. Congress did change a couple
22 of Federal rules explicitly.

23 So I, I cannot comprehend how, if the case
24 reached the jury, you would have to charge above
25 predominance. And I, I think we've got a stone rolling

1 downhill to the dismissal point, which is why we have
2 urged in the brief and why the Seventh Circuit was
3 concerned as was the Sixth about this jury trial
4 implication --

5 JUSTICE BREYER: Yeah, and so I think we
6 have to reach it, because it can't possibly be you would
7 instruct the jury you need a strong inference, and it
8 couldn't possibly be that a predominance standard if
9 imported into the pleading would always mean a strong
10 inference. You see, that's -- that's the dilemma. And
11 I don't see how to remain true to the words of the
12 statute which are strong inference, without actually
13 producing a dichotomy. And so either Congress can do it
14 or it can't, and -- and -- and that's -- and we could
15 fudge it by just, you know, avoiding it at this moment.
16 But I don't --

17 JUSTICE SCALIA: Mr. Miller, suppose
18 Congress set up a entirely separate cause of action.
19 It's caused -- it's called a discovery cause of action,
20 okay? And it sets forth as the condition for pursuing
21 that cause of action a standard that your, your
22 allegation has to be indeed clear and convincing.

23 Okay?

24 And then if you win that, you can take
25 whatever you get out of the discovery and bring a

1 lawsuit. Would that be unconstitutional?

2 MR. MILLER: Why do I feel wind whipping
3 past my ears as I go through a trap door?

4 (Laughter.)

5 MR. MILLER: Ironically, ironically, I think
6 I have to say if Congress, leaving to one side
7 justiciability problems with the discovery cause of
8 action, if Congress created a discovery cause of action
9 it could ascribe to it whatever incidents it wanted
10 to --

11 JUSTICE STEVENS: Surely it could prohibit
12 discovery altogether which it did before they adopt in
13 1938.

14 MR. MILLER: That is correct. And I don't
15 think anybody seriously argues that discovery is a
16 constitutional right.

17 The jury trial implications of this new
18 cause of action are interesting. This Court has
19 protected post-1791 statutory claims and their right to
20 jury trial, but you're positing one that wasn't known in
21 1791, and maybe it could be done without a jury. That's
22 really a hypothetical.

23 THE COURT: Thank you, Mr. Miller.

24 Mr. Phillips, you have four minutes
25 remaining.

1 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS,
2 ON BEHALF OF PETITIONERS

3 MR. PHILLIPS: Thank you, Mr. Chief Justice.

4 I have to confess I'm -- I'm slightly
5 perplexed by exactly what the Respondent's position is
6 in this case so I'm inclined to kind of go back to the
7 core points that have been raised by the questions from
8 -- from the Court. And in the first instance, it seems
9 to me quite clear that the Seventh Circuit did not apply
10 the strong inference standard. If -- you can compare
11 the language from the First Circuit circuit that
12 specifically says it has to be reasonable and strong,
13 strong has completely fallen out here. I don't see any
14 way to read it the other way.

15 I think in response to Justice Breyer's
16 question, which is how do, how should you write the
17 opinion, I think the meaningful way to write the opinion
18 is to be respectful of Justice Scalia's desire to
19 provide guidance. So I do think you should say, you
20 have to, as Justice Alito said, review the entirety of
21 the document and -- and infer both positively and
22 negatively as you go forward. We know that has to be
23 true. Almost every court that's dealt with these issues
24 --

25 JUSTICE GINSBURG: But then you're doing

1 away with reading the allegations in the light most
2 favorable to the plaintiff.

3 MR. PHILLIPS: Absolutely. Absolutely,
4 Justice Ginsburg. There's no question that that's --
5 that that's what Congress had to have meant under these
6 circumstances. And the best example of that is the CEO
7 who sells securities during the time period of the class
8 action. There are dozens of cases in which that
9 happens. Does it create an inference of scienter? It
10 might, because it's quite possible that he sold and --
11 he lied about the stock in order to keep the price up to
12 sell. It is also possible that he sells only about 1
13 percent of the stock --

14 JUSTICE GINSBURG: But Mr. Phillips, you
15 don't look at these things one at a time. You look at
16 them altogether.

17 MR. PHILLIPS: Well, that is --

18 JUSTICE GINSBURG: Is the statute all you
19 had?

20 MR. PHILLIPS: Justice Ginsburg, I couldn't
21 disagree with you more about that. That is precisely
22 what Congress says when -- when it says with
23 particularity. And when Congress says you have to look
24 at each defendant. You cannot do --

25 JUSTICE GINSBURG: It says you must plead

1 the facts with particularity.

2 MR. PHILLIPS: Yes.

3 JUSTICE GINSBURG: But when one judges the
4 adequacy of the complaint, one looks at all the facts
5 pleaded with particularity, not just one.

6 MR. PHILLIPS: But the strong inference of
7 scienter is not pled on a group basis. It has to be
8 pled with respect to each individual defendant. So it's
9 quite convenient --

10 JUSTICE GINSBURG: Well, I think that this
11 case was a good example. There were two defendants and
12 the court of appeals --

13 MR. PHILLIPS: Well, there were a lot more
14 than that.

15 JUSTICE GINSBURG: Well, to take the two
16 that were at issue in this opinion. The court of
17 appeals said the CEO, yeah, there's enough there to get
18 over that threshold. The other guy, no, there wasn't.

19 So it's not that she's saying what you find
20 for one, you find for all. She is going at it defendant
21 by defendant.

22 MR. PHILLIPS: Well, I -- I -- I mean, I was
23 commenting primarily on Professor Miller's decision to
24 just sort of sweep everything in and say look, back in
25 1999 and 2000 when the Seventh Circuit itself

1 specifically said that the knowledge, for instance, of
2 the 5500 decline didn't happen until March of 2001. So
3 I was just saying you can't start sweeping everything
4 in.

5 But -- and it is true, the court
6 distinguished between those two individuals; but the
7 bottom line remains the same. You have to analyze them,
8 each. And you have to take into account contending
9 inferences. You have to construe ambiguity contrary
10 to the plaintiff sometimes --

11 JUSTICE GINSBURG: What do you do with a
12 report that you know exists because you had one of these
13 26 confidential people tell you? But you haven't seen
14 the report, so you don't have the date on it? And you
15 won't know that date unless you have access to
16 discovery. Do you have to assume the date is later
17 rather than sooner?

18 MR. PHILLIPS: I think you better make an
19 allegation with particularity that that date was at a
20 time when the individual would know that the -- that the
21 information that he was conveying was -- was wrong. I
22 don't see how you can infer strongly --

23 JUSTICE GINSBURG: But you -- if the
24 plaintiff --

25 MR. PHILLIPS: -- scienter otherwise.

1 JUSTICE GINSBURG: The plaintiff can't know
2 for sure without seeing the document with a date on it.

3 MR. PHILLIPS: Well, the plaintiff can ask
4 the confidential informant as much as, as he wants about
5 the information; and if he can't come up with it, that's
6 the price you pay. That was exactly what Congress said,
7 is if you cannot make those particular allegations, then
8 you're out of luck. And it's not as though they give
9 you one shot for this.

10 JUSTICE GINSBURG: Congress -- Congress used
11 words, "strong inference." Those words are not
12 self-defining. One can think of several ways, in fact
13 the courts of appeals did think of several ways. Why
14 should we pick your way as opposed to the other ways one
15 might define them?

16 MR. PHILLIPS: I could be flip to say it's
17 the right way. But I think the -- I mean the answer to
18 the, the answer to why to choose our approach is because
19 it is consistent with Matsushita and Monsanto and it
20 will allow, Justice Breyer, to apply it in an
21 individualized way, in a fashion that will give guidance
22 to the lower courts. Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Phillips. The case is submitted.

25 [Whereupon, at 11:03 a.m., the case in the

1 above-entitled matter was submitted.]

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A	17:17 18:15 20:2	54:9	9:10,11 18:12 25:21,24 34:4 51:9 55:20	assume 12:22,25 13:17 21:11 37:20 54:16
abatement 32:7 32:12	advocate 33:12	ambiguous 22:16	applying 21:9 21:24 25:25 26:4,16	assumptions 22:5
ability 31:12 43:8	affect 12:11,11	Amendment 4:5 4:11 5:6,15,19 18:8,10 23:7 23:11,12 24:13 30:6,9,14 32:19 34:21 36:6	approach 5:14 41:4 55:18	attached 39:13
able 28:11	affidavit 7:16		approaching 11:23	attempt 36:11
above-entitled 1:12 56:1	affirmative 39:23		appropriate 5:9 6:6 25:19	authority 4:9
abrogated 21:1	ago 39:22		approved 12:19	available 15:2 23:1 27:16,17
absolutely 8:12 16:11 31:6 52:3,3	agree 28:7 37:12 48:3	amicus 1:20 2:7 7:11 8:13 17:8	April 16:4,12 28:21	Avenue 37:1
abstractly 43:17	ah 6:16	analysis 3:21 5:2 7:3	argue 9:15	avoid 4:14 23:8 41:12 48:10
abuses 9:18	air 45:2	analyze 7:6 54:7	argues 50:15	avoidance 24:5
abusive 3:12 17:14,17 24:18	AL 1:3,7	analyzed 7:5	arguing 10:2,3 10:19 29:21	avoiding 36:5 49:15
acceptance 12:24	Alito 8:22 24:12 24:18 36:20 51:20	Anderson 40:11 40:22		a.m 1:14 3:2 55:25
access 7:17,23 54:15	allegation 5:1 10:14 13:15,18 14:16,19 15:3 15:8,12 20:23 24:23,25 28:8 49:22 54:19	answer 4:7 6:7 15:12 19:25 26:11 35:4 55:17,18	argument 1:13 2:2,5,8,11 3:3 3:7 4:1,5 9:7,8 17:7 27:7 30:9 36:24 40:6 41:23 48:5 51:1	B
account 10:13 54:8	allegations 5:2 18:21 20:8,15 20:25 21:2,18 22:2,9,16,20 22:21 23:19 38:6 47:7 52:1 55:7	anticompetitive 34:13	ARTHUR 1:22 2:9 27:7	baby 12:19 48:2
accounting 27:20	allege 18:18 22:25 24:21 30:24	antitrust 34:9 34:13	Article 45:12	back 15:25 16:22 23:3 33:24 38:12,16 43:3,12 51:6 53:24
accumulate 21:20	alleged 15:5 22:8 23:1 36:22	anybody 50:15	articulate 30:10 25:17 42:21	background 21:1 48:19,20
achieve 12:4,6	alleges 9:1	anymore 29:20	articulated 29:23	backward 46:12
act 5:10 13:19 17:16,24 20:21 21:10 23:19	alleging 17:22 24:25	appeal 41:15	articulation 29:23	back-dating 38:19
acted 3:11,19 9:18 16:11 18:19 35:8	allow 55:20	appeals 3:21 11:4 16:7 17:20,23 25:17 25:21,24,24 26:5,7,8,18 53:12,17 55:13	ascribe 44:7 50:9	bad 38:4,5,6,14
acting 8:9	alleges 9:1	APPEARAN... 1:15	aside 5:13 19:12	balance 17:3 40:13
action 8:8 17:14 49:18,19,21 50:8,8,18 52:8	alleging 17:22 24:25	appendix 29:24	asked 30:19	Bank 7:4
actions 17:12,17 48:19	allow 55:20	applicable 25:17	asking 4:13 5:9 6:10 10:5,9 46:3,12	bar 33:13
address 17:16 18:6 19:17,25	allowing 8:15	application 26:7	assertion 23:3	based 15:13 22:5
addressed 5:5	alteration 12:6	applied 3:24 6:18,24 19:2 20:10 29:25 30:11 40:22 46:7	assertions 34:11	basic 11:22
adequacy 53:4	altogether 50:12 52:16		assess 36:20	basically 4:23
adjudication 23:9	ambiguities 10:11 22:17	applies 23:5	assessment 39:17	basis 15:10 47:5 53:7
adopt 50:12	ambiguity 29:6	apply 4:23 5:11	Assistant 1:18	bath 12:20 48:2
adopted 7:1				becoming 46:24
				beginning 31:22
				behalf 1:16,20 1:22 2:4,10,13

3:8 17:8 27:8 51:2 behold 35:25 believe 8:20 15:13 18:5,7,9 18:11,16 19:17 21:1 24:5,10 25:18,19 26:17 27:11,12 28:21 30:5 34:6 38:13 43:3,4,5 44:13 46:7,20 believes 19:4 26:15 Berlin 47:21 best 25:14 29:3 29:4,19 52:6 better 24:6 54:18 beyond 10:18 33:4 34:11 45:4 bit 12:22 35:17 blinders 36:16 Bock 36:13 bottom 54:7 Breyer 14:10 15:4,18,22,24 16:12,19,20 25:7,15 26:10 26:14 27:13 28:15,24 29:9 31:15 32:4 35:15 36:8 41:3 49:5 55:20 Breyer's 51:15 brief 8:13 11:21 49:2 briefly 19:12 briefs 7:11 bring 42:10,18 49:25 bringing 42:17 Brooklyn 45:20 brush 38:23,25 39:1	build 16:13 building 16:13 37:4 built 47:18 burden 8:2,4 18:17 30:18 32:3,4,17,23 48:14 Burlington 43:6 business 27:15 27:15 buy 38:3 buyer 8:3 <hr/> C <hr/> C 2:1 3:1 calibrate 32:10 call 33:21 37:19 called 49:19 Cambridge 1:22 candor 35:16 canon 24:4 Capitol 37:2,7 39:3 carries 8:1 11:1 CARTER 1:16 2:3,12 3:7 51:1 case 3:4,21 4:12 4:14,21,22 5:7 7:5,6,21,22 8:7 9:21,22 11:4 11:12 14:23 16:25 17:19 18:6 20:14,14 22:20,21 23:4 24:3 25:14,16 26:5,6,17 28:4 28:4,12 29:9 31:1,2,10 34:8 35:16,20 42:18 46:14,20 48:23 51:6 53:11 55:24,25 cases 6:25 25:18 27:2 30:24 32:14 33:17 34:9,9 36:3	40:12,16,23 41:4 42:11,17 47:24,25 48:3 52:8 categorically 3:13 categorize 43:15 cause 7:16 43:16 44:20,23 49:18 49:19,21 50:7 50:8,18 caused 8:15 49:19 central 16:24 CEO 12:23 13:3 13:9,15 23:1 28:1,11 29:17 52:6 53:17 CEOs 13:19 certain 8:25 certainly 11:6 11:10 23:10,14 25:19 26:7 36:8 47:8 cetera 32:8 chains 40:13 chance 28:25 change 11:22 21:7,8 33:1 42:14 46:5 48:14,16,17,18 48:19,21 changed 30:4 changes 20:6 channel 37:24 37:25 38:4,4 38:11,13,19,20 charge 48:24 Chief 3:3,9 17:4 17:10,25 18:5 27:4,9 29:21 30:8,16 32:16 32:20,22 34:1 34:15 40:15,21 42:14 45:17,25 46:21 47:12 51:3 55:23	cholesterol 38:5 38:5 choose 55:18 choosing 24:7 circuit 6:14,16 6:17,18,23,23 6:24 27:11,12 29:10,22 30:7 37:11 38:8,17 38:22 41:1,2,2 42:21,25 46:7 49:2 51:9,11 51:11 53:25 circuits 21:9 43:1 Circuit's 6:20 circumstances 39:16 52:6 circumstantial 43:5 citizen's 7:23 Citytrust 7:4 civil 7:21,22 20:14 claim 5:20,21,22 5:23,23 15:10 20:19 23:7,12 31:21,21,23 46:8 claimed 15:14 claims 5:22 50:19 class 52:7 classic 46:7,18 clear 5:8 8:18 9:8 11:16 18:4 20:5 24:19 25:22 30:12 33:1 44:24,25 45:5 49:22 51:9 clearly 3:23 5:14 9:17 12:19 21:7 climb 47:20 Coat 43:6 codified 25:4	colloquial 45:20 come 6:13 25:25 26:8 31:17,24 38:16 55:5 comes 14:25 comfortable 7:3 coming 33:24 37:3 38:12 commenting 53:23 commission 45:12 common 13:18 32:8 companies 17:15 company 13:20 14:14,24 15:7 15:19 16:17 company's 14:12 compare 51:10 competitive 34:12 complained 38:12 complaint 3:17 7:5,6 9:2,3 10:10 20:8,9 20:16 21:5 22:16,24 23:20 25:13 27:14 28:16 36:15,17 36:22 37:12,17 41:10 45:14 46:14 53:4 complaints 3:14 completely 51:13 comprehend 48:23 concede 39:18 concern 19:1 22:14,20 24:20 25:3,16 concerned 12:8 12:14 24:18,20
--	---	--	---	--

<p>24:22 49:3 concerns 18:8 18:10 42:20 concession 16:9 conclude 10:22 35:20 concludes 45:13 conclusion 10:4 18:19 38:9 conclusive 40:20 conclusory 24:23,24 concrete 22:19 condition 49:20 conduct 9:23 10:1,4 22:1 26:23 34:13 confess 51:4 confidential 27:19 28:3,11 29:12 38:10 54:13 55:4 Congress 3:11 3:22 4:9 6:5,16 7:1 8:16,20 9:17 10:21 11:23 12:3,6 17:2,17 18:15 20:2,21,23,24 21:1 24:17,20 24:21 25:3 30:2,9,11,17 30:17,20 31:3 32:2,9,17,23 32:25 34:2,5,6 34:16,18 37:8 39:3 40:16 41:6,22,24 42:19 46:17,20 47:3 48:13,16 48:17,18,19,21 49:13,18 50:6 50:8 52:5,22 52:23 55:6,10 55:10 congressionally 12:19</p>	<p>Congress's 11:2 18:11 24:7,11 consider 21:25 22:17 23:25 37:6,9 38:25 39:5 consideration 40:7 considered 32:13 considering 36:22 40:6 consistent 5:14 18:11 19:7 24:6,10 55:19 Constitution 5:16 constitutional 6:4,11 19:1,12 19:15 23:9,16 23:17,23,24 24:3,5 31:19 50:16 construction 36:12 construe 6:12 20:8 54:9 construed 20:16 construing 39:9 contending 54:8 context 14:20 44:21 contradiction 22:9 contrary 15:16 31:2 37:14 47:22 54:9 control 32:9 42:11 47:25 convenient 53:9 conversations 14:13 conveying 54:21 convincing 11:17 30:12 33:1 44:25 45:6 49:22</p>	<p>core 32:11,13 33:19,22 40:14 51:7 cornerstone 17:15 correct 23:15 25:21,25 26:4 30:16 31:7 50:14 correlation 39:23 costs 17:14 couple 25:8 39:21 48:21 course 16:15 20:14 court 1:1,13 3:10,20 4:11 4:13,18 5:5 10:9 11:1,4,11 12:14 16:7 17:11,20,23 18:5,8 19:4,17 19:25 21:25 22:16 23:19 24:3,7 25:16 25:20,20,23,24 26:5,6,8,14,17 27:10,23 30:22 31:17,20,24 33:23 34:9 36:12 37:4 50:18,23 51:8 51:23 53:12,16 54:5 courts 21:3 25:6 26:16 32:10 39:12 55:13,22 Court's 11:13 create 21:21 34:2 52:9 created 50:8 creating 11:8 criminal 8:7 44:21 critical 39:17 crystal 24:19</p>	<p>curb 3:11 9:18 curiae 1:20 2:7 17:8 curious 36:16 46:14 current 13:9 customer 29:19 cut 46:20 cuts 31:11</p> <hr/> <p>D</p> <hr/> <p>D 3:1 damages 31:18 date 18:20 28:19 54:14,15,16,19 55:2 day 6:4 9:6 10:9 10:14 41:14 day-to-day 28:14 dealing 4:9 32:11 42:7 deals 42:6 dealt 51:23 deceive 16:11 December 27:16 decide 11:12 23:12 31:5 decided 33:17 decision 6:14,16 6:17 26:1,5,17 46:13 47:5 53:23 decisively 3:11 declared 3:16 decline 28:19 54:2 declining 22:23 deconstruct 36:11 defeat 9:1,5 defendant 3:18 18:19 52:24 53:8,20,21 defendants 35:8 42:4 53:11 defendant's</p>	<p>22:1,18 define 55:15 definition 6:19 degree 18:9 19:1 20:22 delayed 15:7,10 15:19,20,25 16:2,15,22 delivered 15:23 demand 13:7 16:14 22:23 28:18 29:12 demonstrate 5:12 28:12 31:22 demonstrated 8:2 denigrate 37:19 departed 36:14 Department 1:19 depletes 39:23 derived 20:17 designed 27:21 desire 51:18 detail 14:25 determination 23:18 determinative 38:15 determine 19:5 determining 41:19 dichotomy 49:13 differ 31:4 difference 9:20 10:8 31:15 33:15 different 5:22 6:20 19:14 26:1 32:24 34:3 38:2 40:17 difficult 10:22 dike 47:21 dilemma 49:10</p>
--	--	---	--	---

directed 33:15	47:4	17:13	39:2 52:6	27:3
direction 37:2	downhill 49:1	engaging 23:20	53:11	far 4:12,16
disadvantaged	dozens 52:8	39:9	exceed 30:6	11:11,14 34:2
42:4	draw 4:13 37:3	enormous 12:8	exclude 9:10	41:23
disagree 21:23	37:10 40:10	entirely 49:18	excludes 10:4	fashion 55:21
33:8 52:21	drawn 17:23	entirety 27:14	excluding 10:11	favor 10:12 21:6
disconnect 9:12	20:25 21:4,5	42:6 44:17	exclusion 9:23	22:18,19
12:2,15	36:21,23	45:13 51:20	exculpatory	favorable 20:9
discontinuity	driving 36:5	entitled 38:24	36:19	20:17 21:3,12
48:10	dropped 29:14	39:5	Excuse 41:25	21:18 22:5
discounting	29:15	entry 30:21,23	executives 14:13	36:17 39:19,19
38:2	drying 28:18	31:3,7,8,9 32:5	existed 30:25	52:2
discounts 44:18	29:12,18	32:6,21	exists 54:12	favorably 21:13
discovery 7:22	Dutch 47:21	envy 46:15	expense 12:8	22:10 39:10
12:9,10 47:11	D.C 1:9,16,19	equally 16:5	explanations	Federal 31:17
47:16,19 49:19		equate 10:22	5:13 9:10 22:1	31:20,24 32:10
49:25 50:7,8	E	equivalent 4:3	36:19	43:11 48:17,22
50:12,15 54:16	E 2:1 3:1,1	11:16	explicitly 48:22	feel 50:2
dismiss 20:20	earlier 18:1	err 10:25	expressed 47:23	feels 19:25
31:11 33:25	40:25	erred 17:20	extends 5:6	fight 41:14
34:3 45:15	early 28:20	error 3:20	extensive 27:19	figure 45:3,3
47:1	29:13,14	ESQ 1:16,18,22	extent 5:5 19:3	figures 14:5
dismissal 49:1	earnings 12:23	2:3,6,9,12	20:13,24 24:2	file 43:22
dismissed 9:3	13:3,6,10	essential 17:13	extraordinary	filed 3:15
disparity 18:7,9	38:18	essentially 35:10	3:13	financial 14:12
dispositive	ears 50:3	establish 31:3		find 25:9 28:16
31:11 33:14	easier 43:18	41:18	F	35:7,21 43:8
distance 11:6	easily 36:2	established	face 20:7 47:6	43:17 53:19,20
distinct 4:10	east 37:1	30:21 37:21	faced 33:23	finders 35:7
distinguished	effect 10:3 21:23	40:17	fact 4:22,23 27:2	finding 10:22
54:6	26:23 30:19	et 1:3,7 32:8	27:17 29:11	fine 30:25
distinguishing	31:10 33:14,23	evaluate 10:10	32:9,23 33:21	finger 16:16
32:20	46:12	evaluation	35:7 38:22	first 9:15 18:4
district 40:9	effects 25:18	45:13	39:25,25 55:12	20:22 23:11
44:17 45:12	effort 17:16	events 13:21	facts 3:17 8:25	38:22 41:2
46:12,15,18	efforts 29:8	16:1	9:2,4 14:8	51:8,11
diversity 30:24	either 11:1 12:7	everybody 48:3	17:22 18:18	flagship 29:18
30:24	19:22 26:22	evidence 4:17	19:5 20:20	flip 55:16
doctrine 42:25	49:13	9:25 23:21	24:25 29:22	focused 9:22
document 35:19	elevate 30:18	30:13 32:24	36:22,23 37:10	follow 4:3 5:11
51:21 55:2	elevated 43:8,9	35:8,23 36:3	53:1,4	36:10 46:11
documents	eliminated 5:17	43:5	factual 32:18	followed 5:16
39:13	eliminates 39:25	evidentiary 5:3	fair 11:15 48:4	following 19:10
doing 41:22	emanate 37:16	exactly 51:5	fallen 51:13	follows 18:20
44:15 51:25	enactment 21:9	55:6	false 26:24	force 4:6 5:12
door 50:3	enforce 6:5	example 22:19	38:19 40:2,4	22:11
doubt 33:4 45:4	enforcement	25:11,12 37:23	falsity 26:20	forced 9:13

forces 10:21	25:1 30:3	hat 32:8 45:15	implications	37:3,5,6,20
foreclosed 22:2	43:21 55:8,21	head 38:12	50:17	39:19,19 40:13
forgetting 43:13	given 4:4 19:5	health 14:12	important 4:25	40:18,19,20,21
forgive 43:19	28:13 29:6	hear 3:3 26:12	imported 49:9	40:25 41:6,8
former 24:10	37:13 48:9	40:1	impose 7:21	41:11,16,17,20
formula 26:2	gives 19:5 42:11	heard 35:17,20	17:14 18:17	42:15,16,19,22
forth 7:17 14:6	giving 3:18	heavens 45:19	incentives 38:3	42:24 44:11,15
35:17 49:20	20:11	held 4:18,19	incidents 50:9	45:14 46:4,23
forward 51:22	go 4:11 11:2,11	help 48:3	inclined 11:13	47:1 48:7 49:7
four 50:24	11:13 12:2	helpful 41:9	51:6	49:10,12 51:10
fourth 27:22	39:18 41:19	high 8:18 11:9	includes 22:15	52:9 53:6
29:15	48:15 50:3	12:9 18:17,18	including 17:18	55:11
framed 20:2	51:6,22	32:17	income 27:21	inferences 4:13
fraud 24:21	going 10:25	higher 4:24 7:22	incongruity	10:11 20:25
frivolous 42:10	27:21 29:14,19	44:23	12:17	21:4,20 29:22
42:18	30:10 31:24	hill 37:2 39:4	incorrect 48:6	35:13 36:23
fudge 49:15	35:17 37:7,7,8	hindsight 24:21	incredible 42:9	37:10,14,15,18
fully 34:10	40:13 41:7,18	historic 36:15	indicate 41:23	54:9
function 32:12	41:21 42:18	history 25:10	indicated 22:23	informant 55:4
33:19,22 34:10	43:12 53:20	34:7	38:10 42:1	information
36:18 39:17	good 28:25	holding 17:20	indicating 48:6	13:16 27:19
40:14	31:23 38:3,5	holistic 27:14	individual 53:8	54:21 55:5
functions 32:13	47:24 53:11	home 7:17 29:14	54:20	innocent 5:13
fundamental	goods 29:7	29:19	individualized	9:10,23 10:2,4
3:20	37:25	Honor 4:19	55:21	inside 14:24
further 11:3	governed 20:14	honoring 45:12	individuals 54:6	15:15
20:23 41:7	government 8:8	hope 41:18,21	Industries 8:13	insofar 4:21
future 25:18	17:13	44:22,23	infer 10:1 28:9	instance 5:24
	greater 4:9 8:19	Huddleston	28:11 30:2	7:4 51:8 54:1
G	48:1,7	4:19 9:16	42:22 51:21	instances 6:2
G 1:16 2:3,12	Greenstone 43:4	11:21 30:19	54:22	8:14
3:1,7 51:1	43:5	humorous 29:6	inference 3:18	institutions 42:9
game 44:16	group 53:7	hundreds 36:12	3:22 6:13,19	instruct 49:7
General 1:19	guess 13:11	hurt 31:19	7:1,13,13,14	instructed 19:7
getting 7:22,23	21:16 45:3	hypothetical	7:15 8:1,18	30:14
23:22 30:21	guidance 26:15	50:22	10:16,19,24	instruction 4:4
Ginsburg 5:18	40:2 51:19	hypothetically	11:7 13:3,9	48:9
6:3,10 11:15	55:21	37:20	16:10 17:19,22	intend 36:9
11:25 20:4,13	guy 53:18		18:12,14 19:6	intended 3:23
25:23 26:4		I	20:1,11 21:15	8:21 34:6
37:22 40:25	H	idea 45:6	21:21,25 22:4	intensive 45:13
51:25 52:4,14	hands 14:14	III 45:12	22:7,12 25:1,4	intent 11:2
52:18,20,25	28:5	imagine 35:15	25:9,11,12	18:12 24:7
53:3,10,15	happen 54:2	36:2	28:2 30:3	26:22,24
54:11,23 55:1	happens 52:9	implausible	34:16,19,20,25	interest 13:20
55:10	hard 48:13	16:11	35:1,10,11	interesting
give 14:2 18:18	harm 8:14	implication 49:4	36:4,4,9,21	50:18

interfere 30:13	jury 4:4,16,24	44:19,24 45:9	knowledge	11:9 18:19
internal 22:22	12:7,12 18:23	45:17,22,25	26:20 27:2	19:2
22:25 28:17	19:4,6 30:14	46:21 47:9,10	28:9 54:1	limited 20:13
interpret 11:7	31:5 32:12,13	47:12,13,14	known 15:6	line 5:20 11:7
interpretation	33:6,19,22	48:4,12 49:5	16:16 43:10	33:24 40:8,9
5:10 20:11	34:10 36:2,18	49:17 50:11	50:20	46:11 54:7
interpreted 48:5	40:11,14 43:22	51:3,15,18,20	knows 13:3,9	lines 11:13
interpreting	43:22 48:10,24	51:25 52:4,14	15:19,20 28:1	listen 31:13
10:12	49:3,7 50:17	52:18,20,25	<hr/> L <hr/>	literally 45:19
interprets 11:8	50:20,21	53:3,10,15	labor 42:10,17	45:23
intrude 32:18	Justice 1:19 3:3	54:11,23 55:1	language 3:22	litigants 8:11
inventory 29:18	3:9,25 4:15,20	55:10,20,23	8:1 10:20	litigation 3:12
investigation	5:18 6:3,10 7:8	justiciability	51:11	8:15 9:19
29:8 42:3	7:11,20,21 8:4	50:7	Laughter 43:25	11:24
ironically 50:5,5	8:7,12,17,22	<hr/> K <hr/>	44:3 45:24	little 12:21
issue 5:5,8 11:20	9:20 10:17	K 1:18 2:6 17:7	46:2 50:4	Live 41:14
17:19 24:3	11:15,25 12:5	KANNON 1:18	law 6:11 21:8,8	lo 35:25
26:23 38:7	12:21 13:2,8	2:6 17:7	30:2,11 32:8	Lobby 40:11,23
47:16 53:16	13:12,22,25	keep 46:3 52:11	33:8 34:14	location 37:9
issues 1:6 3:5	14:10 15:4,18	Kennedy 3:25	laws 3:15 17:14	logical 6:15
32:9,18 33:21	15:22,24 16:12	4:15,20 8:4,17	lawsuit 50:1	logically 12:11
41:12 51:23	16:19,20 17:4	12:21 13:2,8	lawyers 5:2	long 15:18,20,25
<hr/> J <hr/>	17:10,25 18:1	13:12 18:22,25	lead 42:8	16:2,15 33:20
Jacobs 7:4	18:5,22,25	19:9 26:19,24	leap 16:19	longest 39:12
January 29:16	19:9,11,18,22	27:25 28:7	leaving 50:6	look 6:15 20:7
JNOV 33:15	20:4,13 21:11	33:3,9 41:21	legislative 34:7	25:10 29:10,11
Jones 36:13	21:16 22:3,15	42:1 44:9 47:9	let's 36:25 37:18	36:15,16,19
48:20	23:2,15,22	48:4	37:20,22 47:6	37:12 38:17,17
judge 4:3,22 7:4	24:12,18 25:7	kind 5:3 16:25	47:24,25 48:1	38:18 39:13,13
27:20 38:22	25:15,23 26:4	39:17 40:9	48:1,1	40:10 41:9
39:4 44:17	26:10,14,19,24	47:20 51:6	level 10:15,18	42:5,7,11
45:12 46:12,18	27:4,9,13,25	kinds 37:18	21:14 22:12	47:21 52:15,15
judges 40:9,13	28:7,15,24	knew 13:23,25	32:17 33:5,6	52:23 53:24
46:15 53:3	29:9,21 30:8	14:1,1,2,3	43:10	looked 27:23
judgment 8:24	30:16,20 31:15	16:21,22,23	liberty 40:11,22	38:19,19
9:1,4,5,11 18:2	31:16 32:4,16	28:20,23 48:16	44:6	looking 38:9
18:23 19:3,15	32:21,22 33:3	48:17	Library 37:8	41:7 44:17
24:15 33:16,16	33:9,18 34:1	know 4:1 5:24	39:3	45:14 46:13,25
47:3	34:15,24 35:4	6:1 7:19 12:10	lied 52:11	47:1
judicial 27:25	35:9,15 36:8	29:3,17,20	Life 32:15	looks 27:24 53:4
39:7,13 43:20	36:20 37:22	33:9 36:1 42:2	light 11:22 20:9	lot 30:23 53:13
June 16:4	38:24 39:2,8	44:4 46:8	20:16 21:2,18	lots 35:12
jurisdiction	39:15,22 40:5	49:15 51:22	36:17 52:1	lower 26:16 43:1
32:8	40:15,21,25	54:12,15,20	lightly 36:14	55:22
juror 35:21	41:3,15,21	55:1	liked 44:2	luck 55:8
jurors 35:6	42:1,14 43:12	knowing 14:4	likelihood 8:18	Lynch 38:22
	43:23 44:4,7,9			

M	met 33:5 44:1	motive 10:14 40:1,2,6,7	obviously 3:24 11:1,5,12 25:4 39:6 46:4	3:17 6:25 20:22 52:23 53:1,5 54:19
making 23:17 24:23,24	middle 29:13	motives 8:9	offend 12:3	particularizat...
Makor 1:6 3:4	Miller 1:22 2:9 27:6,7,9 28:3 28:10,23 29:5	multiple 47:23	officer 8:8	43:10,14
manner 19:7	30:5,16 31:6	N	Oh 8:6 16:20 44:22 46:24	particularly 14:9
march 1:10 16:3 28:21 46:10 54:2	32:2,6,20,25	N 2:1,1 3:1	okay 33:20 38:20 39:8 41:10 45:16,17 45:25 49:20,23	Parts 29:13
market 28:17	33:7,11 34:5	nature 28:13	once 27:20	passage 30:1
Markman 33:19	34:22 35:2,6	necessary 18:20	onerous 48:7	passes 30:2
Mass 1:22	35:12 36:7,10	need 4:11 5:10 19:7 20:18 49:7	one-third 43:21	pay 55:6
Matsushita 9:21 9:24 10:5,17 10:23 11:3 34:8 55:19	37:11 38:8	needn't 11:2,11	opening 33:17	Pennsylvania 37:1
matter 1:12 6:6 6:11 19:4 30:11 37:24 40:13 56:1	39:6,11,21	needs 18:5 19:17 19:25	operates 31:11	pensions 42:10
matters 32:12	40:8,19,24	negative 10:11 39:22	opinion 25:8,14 43:20 51:17,17 53:16	people 28:5 29:14,19 31:25 32:1 38:3 44:10 47:25 54:13
Matushita 5:11 9:9	41:14,25 42:5 42:24 43:12,19 44:1,6,13,22 45:8,11,18 46:3,24 47:17 48:12 49:17 50:2,5,14,23	negatively 51:22	opinions 34:10	perceived 18:25
mean 5:4 13:5 18:23 21:17 29:2 35:10 37:25 38:1,2 41:18 44:25 45:6,9,11,18 49:9 53:22 55:17	Miller's 53:23	never 5:5 16:8 32:13 43:10 44:1	opposed 55:14	percent 6:22 7:13,14,14 8:5 29:15,15 43:16 44:10,16 52:13
meaning 34:25	mind 3:19 9:17 17:22 18:20 21:21 24:24,25 25:2	nevertheless 16:10	oral 1:12 2:2,5,8 3:7 17:7 27:7	percentage 43:15,21 44:7
meaningful 51:17	minutes 4:1 39:22 50:24	new 12:24 32:15 50:17	order 11:3,11 20:20 21:21 48:10 52:11	percentages 7:12,20
means 7:13 21:19 25:11 34:19	misinterpreted 17:23	nonculpability 37:19	ordered 29:14 38:1	period 15:25 52:7
meant 34:4 52:5	misrepresenting 13:21	normal 29:25	ordinary 20:14	pernicious 25:18
meet 25:13 35:13	misstatement 27:2	Notebaert 14:11 16:3,8 27:16 28:4	ought 9:16	perplexed 51:5
meets 25:13 36:3	misstatements 12:23	notice 3:14 27:25 39:7,14 42:12 46:9	outset 30:25	person 8:8 30:1 37:3,7,7,8 42:22
merely 25:1	moment 49:15	notion 16:2 29:5 35:14 36:15 37:25 38:16 40:12 42:22,24	overall 13:20	personal 13:19
meritorious 17:12	monolithic 6:23	number 6:24 12:1 25:5 30:6 45:2	overrule 30:19	persuasiveness 48:14
merits 23:23,25 31:5 32:21,23 34:4	Monsanto 5:11 9:9 34:8 55:19	numbers 43:18 44:16	overwhelming 31:21	petition 3:16 29:24
	months 40:2	O	P	Petitioner 31:13
	morning 3:4	O 2:1 3:1	P 3:1	petitioners 1:4 1:17,21 2:4,7 2:13 3:8 17:9 36:10 37:23 51:2
	motion 9:5 20:7 20:20 31:10,11 33:14,16,24 34:3 45:15 47:1	objecting 11:10	page 2:2 3:16 29:24	
	motions 39:4	obstacles 29:6	papers 7:24	
			part 12:19 24:19	
			partial 27:13	
			particular 4:12 5:14 9:21 11:4 55:7	
			particularity	

Phillips 1:16 2:3 2:12 3:6,7,9 4:7,18,25 5:18 6:1,21 7:8,10 7:18,25 8:6,12 8:20 9:6 10:7 10:25 11:19 12:1,13 13:1,5 13:11,14,24 14:7,18 15:9 15:21,24 16:18 16:21 17:5 30:18 47:22 50:24 51:1,3 52:3,14,17,20 53:2,6,13,22 54:18,25 55:3 55:16,24 phone 28:5 pick 6:18 55:14 picked 6:16 picking 45:2 piling 39:18 place 21:13 plaintiff 5:20,21 9:1 10:12 17:21 18:18 20:9,17,18 21:3,12,14,19 21:19 22:6,15 24:14,15,22 29:7 35:16,22 39:10 42:2 44:2 52:2 54:10,24 55:1 55:3 plaintiffs 5:4,12 14:23 24:20 plaintiff's 21:5 22:19 37:15 plausibility 10:23 plausible 10:19 16:8 plead 24:14 52:25 pleaded 53:5	pleader 36:18 pleading 3:14 4:2 8:23 9:11 11:16 12:15 17:18 18:3,13 18:15 19:14 20:3,4 23:6 24:19 33:5,13 34:18,19 42:7 46:9 48:8,11 49:9 pleadings 4:10 5:6 6:7 24:9 39:2,9 pleas 32:7 please 3:10 17:11 27:10 48:5 pled 53:7,8 point 3:25 16:22 16:24 26:14 32:21 39:2 42:3 49:1 points 32:6 39:20 51:7 policies 47:23 policy 6:7 23:8 positing 50:20 position 9:14 18:1 51:5 positive 10:10 positively 51:21 possibilities 37:21 possibility 22:17 possible 22:1 52:10,12 possibly 49:6,8 post-1791 50:19 potential 11:5 potentially 16:5 power 6:5 practices 36:14 pre 24:8 precedents 40:10 preceding 43:9	precisely 7:5 8:16 21:23 52:21 predominance 33:13 48:25 49:8 preexisting 21:7 prefer 11:1 preponderance 4:17 32:24 33:1 34:23 35:7,13 43:7,8 45:2 46:22 present 18:7,10 presenting 9:22 presumptively 8:9 previously 15:5 price 52:11 55:6 primarily 53:23 primary 25:15 prior 7:1 28:21 29:25 privacy 7:17 private 3:12 7:24 8:10,11 8:15 9:18 11:23 17:12 47:24,25 48:3 48:18 probabilistic 23:18 probability 18:9 43:21 probable 7:16 11:18 43:16 44:5,20,23 probably 9:15 11:5 problem 6:4,22 13:17 14:18 16:6 17:16 19:13 23:11,16 23:17,23 24:13 24:18 34:21 36:6 problems 23:24	50:7 procedural 36:13 47:19 procedure 47:2 48:20,20 procedures 33:20 proceed 6:6 31:12 process 22:4 produced 15:14 42:8 producing 49:13 product 14:15 14:20 22:23 29:18 38:11 production 14:15 products 12:24 28:13 Professor 41:23 53:23 prohibit 50:11 projection 14:15 projections 13:7 14:16 38:18 proof 4:23 12:16 12:18 18:13,22 30:18 34:18,20 34:22 48:14,16 48:18 properly 46:4 proposed 31:13 35:2 46:6 propositions 30:5 protect 13:19 34:13 protected 33:18 34:10 50:19 protections 47:19 prove 24:15 30:12 31:2 proved 5:21,24 31:1 38:18 proven 47:8	provide 14:24 20:18 26:15 51:19 provided 13:16 provisions 42:7 42:12 PSLRA 30:1 40:16 public 42:9 pulse 14:14 16:17 pursuant 30:14 pursuing 49:20 pushing 38:11 47:4 put 21:3 32:7 47:18 puts 11:20 putting 19:12 45:15 <hr/> Q <hr/> qualification 30:21 31:8 qualifications 30:23 31:9,9 quarter 27:22 29:15 question 4:8 5:19 6:5,8 7:9 15:11 18:1,6 19:17,19,23 20:1 23:4 26:11 44:20 47:14 51:16 52:4 questions 51:7 quite 5:8 6:20 16:7 28:25 46:4 51:9 52:10 53:9 <hr/> R <hr/> R 1:22 2:9 3:1 27:7 raise 32:2,9 33:13 raised 11:20
---	---	---	--	--

23:8 51:7 raising 24:8 range 32:14 reach 23:4 49:6 reached 38:8 48:24 reaches 10:15 read 8:13 14:3 17:1 21:2,12 21:18 29:23 34:10 35:19 36:17 41:10,11 42:15 51:14 readily 24:21 reading 21:13 22:9 52:1 real 6:22 realities 47:17 really 5:5 20:17 31:21,25 32:1 44:2 47:16 50:22 realm 39:11 reason 14:2 15:13 23:16 28:20 38:13 43:4 46:19 reasonable 21:4 21:20 25:1,4 30:1 33:4 34:25 35:6,11 35:13,21 42:22 45:4 51:12 reasoning 22:4 REBUTTAL 2:11 51:1 recall 9:24 10:18 recklessness 26:22 reclaim 44:19 recognize 41:22 recommending 43:2 reconsider 12:17 reconsidered 9:16 11:22	record 4:14 reduces 39:25 reduction 40:2 refer 22:4 referred 27:20 32:6 33:18 36:13 Reform 5:10 17:16,24 20:21 21:10 23:19 regard 21:8 26:22 regarding 19:1 regime 24:14 rejecting 3:13 9:17 relevance 40:7 relevant 20:19 remain 49:11 remaining 50:25 remains 21:23 54:7 remand 25:20 remanded 26:6 remember 14:22 removed 5:4 repeat 39:21 repetition 40:12 reply 11:21 report 12:23 13:6 14:21 15:1,15,15 28:17,25 54:12 54:14 reports 13:3 14:3,15,22 16:8 22:22,25 representative 42:8 require 10:18 16:25 20:22 required 3:19 18:10 19:2 21:22 23:18 requirement 17:19,21 18:12	18:14,16 20:18 requirements 17:18 31:3 requires 14:8 18:17 22:11 43:10 requisite 19:6 26:19,21 reserve 17:3 resolution 33:21 resolve 12:16 resolving 23:12 respect 15:6 53:8 respectful 51:18 respond 48:13 Respondents 1:23 2:10 27:8 Respondent's 51:5 responding 8:16 response 27:13 51:15 revealed 28:17 revealing 16:3 revenue 28:18 reverse 11:3 reversed 26:6,18 review 51:20 right 4:11 13:1 15:9 18:24 27:1,11 29:23 41:15 45:23 47:25 50:16,19 55:17 Rights 1:6 3:5 rigorously 3:24 rise 3:18 10:18 18:18 19:5 21:14 22:12 25:1 30:3 rises 10:15 road 11:17 ROBERTS 3:3 17:4,25 27:4 29:21 30:8 32:16,22 34:1	34:15 40:15,21 42:14 45:17,25 46:21 47:12 55:23 rolling 48:25 routinely 13:15 14:3 rule 3:14 6:23 20:10,15,15,17 21:1,12,23 31:7 33:10,11 36:11 43:11 rules 48:17,22 ruling 11:13 run 23:24 47:25 runs 15:25 <hr/> S <hr/> S 2:1 3:1 sakes 45:19 sales 13:6 14:14 satisfy 17:21 saw 14:14 16:8 36:25 saying 9:2 11:10 13:22,25 14:1 14:2 22:10 29:12 30:2 31:16 32:22 35:9 42:16 46:25 53:19 54:3 says 14:10,21 15:16,22 16:2 16:12 17:2 24:14 27:17 30:12 33:12 34:18 43:20 45:16 51:12 52:22,22,23,25 Scalia 8:7,12 12:5 13:22,25 23:2,15,22 30:20 31:16 41:15 43:23 44:24 45:9,22 49:17	Scalia's 51:18 schizoid 46:25 scienter 11:9 26:21 35:8 38:23 42:7 52:9 53:7 54:25 se 40:7 search 7:16 Second 6:14,15 6:17,18,20,22 6:23,24 41:1 42:25 securities 3:12 3:15 8:13 9:18 11:23 17:14 52:7 see 22:8 36:5,25 39:19 40:12 41:5 48:15 49:10,11 51:13 54:22 seeing 55:2 seeking 8:8 seen 43:20 54:13 selection 42:8,12 self 13:19 selfish 8:9,11 self-defining 55:12 sell 52:12 selling 27:18 sells 52:7,12 semantic 10:8 send 36:2 sense 12:3 13:18 20:15 24:13 29:6 38:11 separate 49:18 seriously 50:15 set 5:13 8:25 12:9 14:6 19:5 32:17,23 49:18 sets 35:16 49:20 Seventh 4:5,10 5:6,15,16,18 18:8,10 23:7
---	--	--	---	---

23:10,12 24:12	46:25 51:4	4:23 5:1 7:2,22	34:7 42:5,6,11	49:7,9,12
27:11,12 29:10	Slocum 32:14	8:23,24 9:15	42:15 47:22,23	51:10,12,13
29:22 30:6,7,9	sold 15:11 52:10	10:23,24 11:7	48:15 49:12	53:6 55:11
30:13 32:19	solely 19:1	11:17 12:7,7	52:18	stronger 5:23
34:21 36:6	Solicitor 1:18	12:11,15,16,18	statutes 3:23	7:15,19 10:2
37:11 38:8,17	somebody 36:25	18:2,3 20:2	statutory 50:19	10:20 44:11,20
42:21 46:7	37:1	21:25 23:5	stayed 14:11	44:22
49:2 51:9	sooner 54:17	24:8,9 25:5,17	step 3:13	strongly 54:22
53:25	sorry 7:10 45:20	25:21,25 26:4	Stevens 7:8,11	structure 47:2
Shanmugam	47:12	26:7,16,19	7:20,21 19:11	study 22:22,25
1:18 2:6 17:6	sort 11:22 13:6	29:24,25 30:4	19:18,22 34:24	stuffing 37:24
17:10 18:4,24	18:7 38:10	30:10,15 33:4	35:4,9 43:12	37:25 38:4,4,6
19:16,24 20:12	45:15 53:24	34:3,4 35:2,24	44:4,19 47:10	38:11,13,19,21
21:16 22:14	sounds 38:4	36:3,9 40:17	47:13,14 50:11	subdivision 43:9
23:2,14 24:2	47:9	41:1 42:20,23	stock 52:11,13	submission 4:20
24:17 25:15	sources 27:19	43:1,7 46:22	stone 48:25	18:23
26:3,13,21	28:4,12 29:12	46:23 49:8,21	strategic 29:5	submitted 55:24
27:1,5	38:10	51:10	strength 9:23	56:1
SHANMUGAN	Souter 9:20	standards 6:18	19:6 22:12	subsidiary
17:7 19:20	10:17 21:11,16	6:25 9:9 19:13	36:21 37:15	21:20 39:1
shareholders	22:3,15 33:18	23:10,13 24:1	43:15	substance 33:8
17:15	38:24 39:8,15	31:13 34:17	strikes 16:11	33:12
shenanigans	39:22 40:5	41:19 45:1	stringent 17:18	substantial
27:21	so-called 32:7	48:16	stroke 38:23	17:14 24:4
Shields 7:3	speak 22:12	standing 34:12	strokes 38:25	substantive
shift 27:21 42:9	29:7	start 54:3	39:1	30:11 34:13
shipped 15:23	specific 13:5	starting 32:14	strong 3:18,22	suffering 32:1
38:1	14:17 28:8	42:25	6:12,19 7:1,13	sufficient 8:25
shipping 16:13	37:23	state 3:17,19	7:15 8:1,18	14:8
27:17	specifically	17:22 21:21	10:16,23 11:7	sufficiently 24:4
shortened 20:19	14:20 16:7	24:23,25 25:1	13:2,8 16:10	suggest 15:2
shot 55:9	22:24 51:12	48:12	16:14 17:18	suggesting
show 14:9 24:15	54:1	stated 5:20,23	18:12,14 19:8	12:13
28:9 34:19,22	specificity 16:25	22:5 46:8	20:1,11 21:15	suits 8:10
showing 5:3	spoke 20:24	statement 13:13	21:21,24 25:9	summary 8:24
side 11:1 50:6	spots 48:15	20:19 26:25	25:11,12 28:1	9:1,4,5,10 18:2
sides 35:18	stage 6:7 8:23	33:17	30:3 31:21,25	18:23 19:3,15
side-bar 37:21	8:24 9:4,11,12	statements 29:1	34:16,19,20,25	24:15 33:16
significant 8:2	9:25 10:6	40:3,3	35:10 36:4	supplement
simply 5:11 13:6	11:16 12:10	States 1:1,13,20	37:5,19 39:20	17:13
13:16 17:21	18:2,3,13,13	11:8 17:8	40:18,19,21,24	support 40:18
19:2 21:11,20	18:15,22 19:3	31:14	41:6,8,10,16	supporting 1:21
34:11 36:11	19:14,15,15	stating 5:22	41:17,20 42:15	2:7 9:3 17:9
39:18 42:21	20:3,5 23:6	status 13:9,21	42:16,19,22,24	21:14
Sixth 49:3	24:8,9 39:4	28:13	43:13 44:11,15	suppose 8:25
slight 10:7	48:8,11	statute 3:22 17:2	45:5,14 46:4	14:4,10 18:25
slightly 24:24	standard 4:3,23	19:20 22:10,10	46:22,25 48:7	34:2 49:17

supposed 29:2 31:5 Supreme 1:1,13 37:4 sure 6:21 8:6 20:1 33:11 42:12 55:2 surely 30:10 50:11 survive 20:20 suspicious 28:15 sweep 53:24 sweeping 54:3	28:15 35:10 41:9 46:15 things 28:1 38:21 45:6 52:15 think 4:7,9,12 5:4,7,8 6:3,4,7 6:14,22 7:2,14 7:18,25 9:6,14 10:7,19,20 11:19,20 12:5 13:14,17 14:7 14:11 15:21 18:24 19:9,13 19:24 20:12 21:22 22:14 25:7 26:8,13 27:23 28:10,11 28:20 29:8,10 31:6 32:14 33:14 34:5,17 35:3,21 38:9 39:15 40:8,9 40:10 41:3,5 41:12 43:3,14 43:18,18,23,24 44:7,8,9,10,14 44:15 45:2,9 45:11 46:19,24 47:7,7,14 48:6 48:25 49:5 50:5,15 51:15 51:17,19 53:10 54:18 55:12,13 55:17 thinking 6:11 Third 41:2 thought 15:4 32:16 41:22 three 25:10 threshold 48:1 53:18 throw 12:18 48:2 ticks 8:14 tie 16:23 22:7 tied 22:8	time 7:1 14:25 17:3 23:1 28:6 33:24 39:12 46:11 52:7,15 54:20 Titan 14:20 22:20 today 37:1 told 12:12 32:16 top 14:12 total 22:11 totality 37:12 46:13 tough 40:8 traditional 3:14 traditionally 10:13 46:9 translate 7:20 trap 50:3 treat 38:20 tremendous 35:16 trial 4:22 23:5 24:16 40:12 46:14,17,19,21 46:22 47:8,10 47:15 49:3 50:17,20 tried 12:9 trigger 24:4 true 6:2,22 23:20 35:15 49:11 51:23 54:5 truth 10:8 try 25:11 trying 7:6 9:11 12:4,6 34:16 turned 12:2 two 5:22 11:6 23:9,13 24:1 25:10 30:5 45:1,25 53:11 53:15 54:6 two-thirds 43:24 typically 14:11	U ultimate 10:4 12:7,16,18 ultimately 21:22 unconstitutio... 50:1 underlying 20:19 26:23 undermine 37:15 understand 6:13 19:18 30:8 36:24 39:24 45:1 46:3 understanding 20:6 uniform 17:17 unions 42:10,17 unique 34:8 United 1:1,13,20 11:8 17:8 31:14 unnecessary 23:8 urged 49:2 urges 47:22 use 7:25 12:12 25:5 useful 26:15 usual 23:8 36:13 47:2 usually 23:23	view 4:2 6:6 9:14 12:22 18:17 20:3,5 21:24 23:15 24:6,6 26:3 27:14 views 24:3 virtually 47:6
T T 2:1,1 take 4:15 5:7,13 9:14 10:13 27:13,25 37:22 39:7 41:8,9 45:19,23 49:24 53:15 54:8 talk 45:5 talking 5:1 8:10 14:19 16:1 28:5,6 43:17 45:5 talks 7:12 tell 4:2 12:21 14:25 38:5 44:11 48:5 54:13 Tellabs 1:3 3:4 tends 43:4 term 22:7 terms 7:12 19:20 20:2,24 25:9 43:15 test 36:2 40:22 46:6,6,11,19 testimony 35:17 Thank 3:9 17:4 17:10 27:4 50:23 51:3 55:22,23 theory 4:21 thing 6:15 11:2	28:15 35:10 41:9 46:15 things 28:1 38:21 45:6 52:15 think 4:7,9,12 5:4,7,8 6:3,4,7 6:14,22 7:2,14 7:18,25 9:6,14 10:7,19,20 11:19,20 12:5 13:14,17 14:7 14:11 15:21 18:24 19:9,13 19:24 20:12 21:22 22:14 25:7 26:8,13 27:23 28:10,11 28:20 29:8,10 31:6 32:14 33:14 34:5,17 35:3,21 38:9 39:15 40:8,9 40:10 41:3,5 41:12 43:3,14 43:18,18,23,24 44:7,8,9,10,14 44:15 45:2,9 45:11 46:19,24 47:7,7,14 48:6 48:25 49:5 50:5,15 51:15 51:17,19 53:10 54:18 55:12,13 55:17 thinking 6:11 Third 41:2 thought 15:4 32:16 41:22 three 25:10 threshold 48:1 53:18 throw 12:18 48:2 ticks 8:14 tie 16:23 22:7 tied 22:8	time 7:1 14:25 17:3 23:1 28:6 33:24 39:12 46:11 52:7,15 54:20 Titan 14:20 22:20 today 37:1 told 12:12 32:16 top 14:12 total 22:11 totality 37:12 46:13 tough 40:8 traditional 3:14 traditionally 10:13 46:9 translate 7:20 trap 50:3 treat 38:20 tremendous 35:16 trial 4:22 23:5 24:16 40:12 46:14,17,19,21 46:22 47:8,10 47:15 49:3 50:17,20 tried 12:9 trigger 24:4 true 6:2,22 23:20 35:15 49:11 51:23 54:5 truth 10:8 try 25:11 trying 7:6 9:11 12:4,6 34:16 turned 12:2 two 5:22 11:6 23:9,13 24:1 25:10 30:5 45:1,25 53:11 53:15 54:6 two-thirds 43:24 typically 14:11	U ultimate 10:4 12:7,16,18 ultimately 21:22 unconstitutio... 50:1 underlying 20:19 26:23 undermine 37:15 understand 6:13 19:18 30:8 36:24 39:24 45:1 46:3 understanding 20:6 uniform 17:17 unions 42:10,17 unique 34:8 United 1:1,13,20 11:8 17:8 31:14 unnecessary 23:8 urged 49:2 urges 47:22 use 7:25 12:12 25:5 useful 26:15 usual 23:8 36:13 47:2 usually 23:23	view 4:2 6:6 9:14 12:22 18:17 20:3,5 21:24 23:15 24:6,6 26:3 27:14 views 24:3 virtually 47:6
			W walking 37:1 wall 12:9 47:18 47:20,20,21 want 23:25 31:25 32:1,10 33:9 35:4 48:4 48:4 wanted 16:15 46:20 50:9 wants 33:1 55:4 warrant 7:16 Washington 1:9 1:16,19 37:5 wasn't 6:10 50:20 53:18 water 12:20 18:14 48:2 watering 24:9 way 6:6 7:4,5 11:8,23 12:16 15:25 17:1 25:14,16 26:9 32:10 36:5,16 48:12 51:14,14 51:17 55:14,17 55:21 ways 12:1 25:8 55:12,13,14 weak 35:23 36:3 36:4,9 38:21 weaken 37:16 weaker 44:20 weakest 35:20 Wednesday 1:10 weekly 14:13,14 weigh 36:18	

weighing 23:20	wrong 15:6	54:2		
weight 40:6	54:21	2007 1:10		
welcome 11:12	<hr/> X <hr/>	25 29:15		
welfare 13:20	x 1:2,8	26 54:13		
went 20:23 29:8	<hr/> Y <hr/>	27 2:10 14:23		
weren't 27:17		28 1:10		
27:18	yeah 12:5 16:20	<hr/> 3 <hr/>		
We'll 3:3	28:24 49:5	3 2:4		
we're 5:1,9 7:6	53:17	30 7:14		
8:10 9:11 10:9	year 15:5,10	33 43:20		
11:9,10 14:19	years 36:12 47:2	<hr/> 4 <hr/>		
16:1 28:6	York 32:15	40 44:16		
31:23 41:7,18	<hr/> \$ <hr/>	400,000,000		
41:21 43:17	\$200,000 31:18	28:19		
44:15	<hr/> 0 <hr/>	49 44:10		
we've 48:25		<hr/> 5 <hr/>		
whipping 50:2	01 16:12 28:20	50 7:13 8:4		
whistleblowers	28:21	29:15 43:16		
14:23	06-484 1:5 3:4	44:10		
willing 46:18	<hr/> 1 <hr/>	506500 15:6		
win 49:24	1 52:12	51 2:13		
wind 50:2	10:02 1:14 3:2	5500 16:6 22:21		
wonder 21:17	100 6:21	27:15 28:6,18		
word 7:13 15:2	11 27:16	29:12 38:17		
22:4 43:13	11:03 55:25	40:4 54:2		
words 6:12,13	12(b)(6) 5:19	<hr/> 6 <hr/>		
6:17 25:10	20:7 45:15	60 7:14		
35:10 41:5,5,5	46:8	6500 14:19,20		
41:8 49:11	17 2:7	14:22 15:1,7		
55:11,11	1791 50:21	15:11,18 27:15		
work 12:22	1938 31:8 50:13	38:18		
22:17 25:14	1995 3:11 9:17	66 43:23		
27:18	1998 16:1,16	<hr/> 8 <hr/>		
working 22:18	1999 16:22	8 20:15,17		
world 14:25	53:25	8's 36:11		
44:5	<hr/> 2 <hr/>	<hr/> 9 <hr/>		
worry 42:16	2 3:16	9(b) 6:25 31:7		
worthy 46:14,17	20 4:1	95 42:9		
46:19,21,22	20A 29:24			
47:8,10,11,15	200 47:2			
47:15	2000 16:1 27:16			
wouldn't 32:18	27:22 29:13			
write 45:22	53:25			
51:16,17	2001 16:1,4,24			
writing 3:21				
4:15 25:8				
written 29:1				