No. 23-970

IN THE

Supreme Court of the United States

NVIDIA CORP. and JENSEN HUANG,

Petitioners,

v.

E. OHMAN J:OR FONDER AB and STICHTING PENSIOENFONDS PGB,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROFESSOR JOSEPH A. GRUNDFEST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CAITLIN E. JOKUBAITIS
MIRIAM R. GEORGE
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, New York 10010
(212) 849-7000

CHRISTOPHER G. MICHEL
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 538-8308
christophermichel@quinnemanuel.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE**

Joseph A. Grundfest is the William A. Franke Professor of Law and Business (Emeritus) at Stanford Law School. He served as a Commissioner of the Securities and Exchange Commission from 1985 to 1990. Professor Grundfest has taught securities law for decades, published extensively on the subject in leading law reviews (including the Harvard, Yale, and Stanford Law Reviews), and has submitted amicus briefs to this Court in significant securities cases, including *Slack Technologies, LLC v. Pirani*, 598 U.S. 759 (2023), and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), as well as at the certiorari stage of this case.

Professor Grundfest also has substantial practical experience with matters directly implicated by this litigation. As a director and chair or member of the audit committees of three publicly traded corporations (KKR, Inc.; Financial Engines, Inc.; and Oracle Corp.), Professor Grundfest has personally addressed difficult disclosure challenges in the highly litigious environment that characterizes modern securities markets. Professor Grundfest combines pragmatic expertise with strong academic credentials relevant to the Court's resolution of this matter.

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* Amicus affirms that no counsel for a party authored this brief in whole or in part, and no one other than amicus or his counsel made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION

This case can be resolved with one of the shorter opinions in recent Supreme Court history. The Private Securities Litigation Reform Act of 1995 ("PSLRA") requires that plaintiffs plead "*facts*" supporting allegations of falsity and scienter.[1] The Ninth Circuit relied on the Prysm Report to find that plaintiffs satisfied their burden to plead falsity and scienter.[2] But the Prysm Report is an *opinion*, not a fact.[3] It therefore cannot support a complaint governed by the PSLRA. The panel below agreed that, but for the Prysm Report, the complaint would be dismissed.[4] The complaint should therefore be dismissed. "The rest is commentary."[5]

The Ninth Circuit's contrary decision has far-reaching consequences for securities litigation. Rule 10b-5's private right of action is implied, not express.[6] This Court has long emphasized its "vexatious" nature.[7] Rule 10b-5 litigation remains

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1 15 U.S.C. § 78u–4(b)(1), (2)(A) (emphasis added).

2 *E. Ohman J:or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918, 936, 940 (9th Cir. 2023), *cert. granted sub nom. NVIDIA Corp. v. Ohman J*, No. 23-970, 2024 WL 3014476 (U.S. June 17, 2024).

3 Fed. R. Evid. 702.

4 *Ohman*, 81 F.4th at 932.

5 Babylonian Talmud, Shabbat 31a:6 (quoting Hillel).

6 *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011).

7 *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

pervasive and expensive.[8] In response, the PSLRA intentionally heightens pleading standards and makes it more difficult for complaints to survive motions to dismiss. Among other constraints,[9] the PSLRA imposes three important pleading requirements on covered complaints: they must (1) be based on facts, not opinions, that are (2) pled with particularity, and (3) allegations of scienter must support a "strong inference" of that mental state.[10]

This Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[11] elaborates on the "strong inference" requirement. The "inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[12] The strong inference test is thus comparative, not absolute; it is ordinal, not cardinal. Even cogent inferences will fail the PSLRA's pleading standard if the complaint does not adequately rebut alternative inferences of non-fraudulent intent.

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[8] Cornerstone Research, Securities Class Action Settlements, 2023 Review and Analysis, pp. 17, 41, available at https://bit.ly/4dlibd1.

[9] The PSLRA's other constraints include staying discovery and other proceedings "during the pendency of any motion to dismiss" in a private action arising under the Act, *see* 15 U.S.C. § 78u–4(b)(3)(B), and requiring plaintiffs to establish loss causation, *see id.* § 78u–4(b)(4).

[10] *Id.* § 78u–4(b)(2).

[11] 551 U.S. 308 (2007).

[12] *Id.* at 314. The inference of scienter "must be cogent and compelling, thus strong in light of other [countervailing] explanations," not merely "reasonable" or "permissible." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014) (alteration in original) (quoting *Tellabs*, 551 U.S. at 324).

These demanding requirements are a feature of the legislation, not a bug. Courts must apply the statutory language according to its restrictive terms and should not dilute the text to save complaints from dismissal. Yet that is precisely what occurred below. The Ninth Circuit improperly treated opinion as fact, disregarded *Tellabs*' directive to evaluate scienter allegations on a comparative basis, and permitted evasion of the particularity standard.

If allowed to stand, the Ninth Circuit's decision will open the floodgates to a new form of securities fraud pleading in which plaintiffs recruit paid experts to generate opinions based on sources of questionable reliability, and then rely on those opinions masquerading as "facts" to defeat motions to dismiss. The opinion below is thus a roadmap for plaintiffs seeking to buy their way out of PSLRA pleading requirements. Congress never intended this result. The decision below should be reversed, and the complaint dismissed.

STATEMENT

A. The Complaint

Plaintiffs allege that NVIDIA fraudulently understated the extent to which its revenues depended on sales to crypto-miners, as opposed to gamers.[13] When cryptocurrency prices fell in 2018, demand for mining chips declined, and NVIDIA's stock price also declined (before resuming a dramatic rise that today makes NVIDIA one of the

[13] *See, e.g.*, First Amended Consolidated Class Action Complaint ("Compl.") ¶¶ 64, 69–70, 172–73.

world's most valuable corporations, measured by market capitalization).[14]

To allege the falsity of NVIDIA's statements regarding crypto-miner demand, and to allege that NVIDIA's management knew or should have known of that falsity, the complaint relies critically on the "Prysm Report," an "Independent Expert Analysis"[15] prepared by two Harvard Ph.D.s retained by plaintiffs from "an economic consulting firm . . . that specializes in distributed ledger and blockchain technology."[16] The Prysm Report estimates sales of NVIDIA's GPUs to crypto-miners, and alleges that NVIDIA should have disclosed information similar to the Prysm Report's conclusions.[17]

The complaint nowhere alleges that anyone affiliated with the Prysm Group had access to internal NVIDIA documents or discussed any matters with current or former NVIDIA personnel. The complaint is silent as to whether plaintiffs sought analyses from other experts (*i.e.,* opinion shopped), or suggested preferred conclusions to Prysm (*i.e.,* opinion steered) in connection with their retention.

The Prysm Report is based entirely on a very specific mathematical calculation that relies on

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[14] *Id.* ¶¶ 16–18. As of the market's close on August 16, 2024, NVIDIA had a market capitalization of approximately $3.06 trillion, making it the third most valuable stock traded in the U.S. markets. *See* Largest American companies by market capitalization, Companies Marketcap, Aug. 16, 2024, https://bit.ly/4dJkUg2.

[15] Compl. ¶¶ 21, 143–47.

[16] *Id.* ¶¶ 143–44.

[17] *Id.* ¶¶ 21, 153–54.

third-party data, of questionable pedigree, that is available in the public domain.[18] The complaint nowhere describes other methodologies or data sources that could reliably measure NVIDIA crypto-miner sales, or that might reach materially different conclusions. The complaint nowhere alleges that such alternative conclusions are impossible or that alternative conclusions would be less credible than the Prysm Report's conclusions.

The complaint also provides no information regarding the credibility of data relied upon by third-party sources that are foundational to the Prysm Report's analysis. For example, the Prysm Report relies on hashrate data "obtained from bitinfocharts.com and whattomine.com, two of the most widely used sources of network hashrate data in the blockchain community."[19] But the complaint offers no support for the proposition that these sources are credible in and of themselves, or more credible than any other source of comparable data.

Experience suggests that "widely used sources" on the internet are not necessarily credible sources, much less the most credible sources.[20] Popularity and credibility are not synonyms on the internet, or anywhere else for that matter.

The Prysm Report also relies on Jon Peddie Research, "a prominent computer industry research

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[18] Compl. ¶¶ 147–54.

[19] *Id.* ¶ 149.

[20] *See, e.g.*, *Jamie Lynn Marketing, LLC v. Clark IV Family Trust*, 2012 WL 400961, at *1 (N.D. Ill. 2012) (discussing "the inherent unreliability of information found on the internet").

firm,"[21] for "market share data . . . [generated] using proprietary analytic models to estimate NVIDIA's market share in this product category."[22] But these models are "proprietary" to Peddie, not to Prysm. Prysm would therefore know nothing about the credibility of Peddie's methodology unless Prysm had access to Peddie's proprietary models, a fact not alleged in the complaint. The complaint also provides no basis upon which to conclude that Peddie's estimates, even if "used by major investment firms,"[23] are more credible than other estimates generated by other sources.

The complaint concludes that NVIDIA understated its true crypto-related revenue "by an average of $225.2 million per quarter," or "$1.126 billion" over the alleged class period.[24] It also seeks to buttress the credibility of the Prysm Report's conclusions by quoting an RBC Capital Markets report that reaches a similar result.[25]

But the complaint nowhere describes the RBC Report's methodology. It also nowhere provides a foundation upon which a court might assess the RBC Report's credibility on either an absolute or comparative basis. And the complaint fails to address the possibility that the Prysm Report merely replicates RBC's analysis, and that both analyses rely on the same questionable data sources

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21 Compl. ¶ 152a.
22 *Id.*
23 *Id.*
24 *Id.* ¶¶ 153–54.
25 *Id.* ¶¶ 20, 140, 152b, 153 n.15.

and contestable methodologies, therefore (unsurprisingly) reaching similar conclusions.

B. The District Court's Opinion

The District Court granted defendants' motion to dismiss the complaint and the amended complaint.[26] As to the Prysm Report, the Court concluded that "[p]laintiffs fail to describe Prysm's assumptions and analysis with sufficient particularity to establish a probability that its conclusions are reliable . . . ."[27] Thus, "[p]laintiffs fail to allege falsity with the specificity the PSLRA requires."[28] When dismissing the amended complaint, the Court concluded that "[p]laintiffs have failed to adequately plead scienter," and, accordingly, the Court need not consider whether plaintiffs pled falsity with particularity.[29]

C. The Ninth Circuit Majority Opinion

In sharp contrast, over a vigorous and detailed dissent, two Ninth Circuit judges concluded that the Prysm Report is "sufficiently reliable" because it was prepared by "knowledgeable and competent professionals," and that the complaint's description of the Report's methodology is sufficiently "detailed

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[26] *See Iron Workers Loc. 580 Joint Funds v. NVIDIA Corp.*, 2020 WL 1244936, at *14 (N.D. Cal. Mar. 16, 2020) (granting motion to dismiss with leave to amend); *Iron Workers Loc. 580 Joint Funds v. NVIDIA Corp.*, 522 F. Supp. 3d 660, 679 (N.D. Cal. 2021) (granting motion to dismiss without leave to amend).

[27] *NVIDIA Corp.*, 2020 WL 1244936, at *9.

[28] *Id.*

[29] *NVIDIA Corp.*, 522 F. Supp. 3d at 679, 679 n.6.

[] to support its conclusions."[30] The panel draws comfort from the fact that the Prysm Report's results are "strikingly similar to the results obtained by RBC in its independent investigation."[31]

The panel's willingness to rely on the Prysm Report was not incidental: it was outcome-determinative. The panel held "that *the combination* of the following is sufficient to show, even under the demanding pleading standard of the PSLRA, there is a sufficient likelihood that a very substantial part of NVIDIA's revenues during the Class Period came from sales . . . for crypto mining: (1) the very similar analyses of RBC and Prysm; (2) the statements of [three confidential witnesses]; and (3) the fact that NVIDIA's earnings collapsed when cryptocurrency prices collapsed . . . ."[32]

Absent the Prysm Report, the requisite "combination" does not exist, and the rationale for the panel's decision to reverse the lower court evaporates. Accepting the Prysm Report as consistent with PSLRA pleading standards is therefore a necessary condition to support the panel's decision to reverse the District Court.

D. The Dissent

The dissent observes that plaintiffs' "central contention . . . is based entirely on a *post hoc* analysis by the Prysm Group [], an outside expert that relied on generic market research and unreliable or undisclosed assumptions to reach its revenue estimates," and that the Ninth Circuit has

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30 *Ohman*, 81 F.4th at 930.

31 *Id.* at 932.

32 *Id.* (emphasis added).

"never allowed an outside expert to serve as the primary source of falsity allegations where the expert has no personal knowledge of the facts on which their opinion is based, for example by corroborating their conclusions with specific internal information or witness statements."[33]

The dissent characterizes the Prysm Report as a "series of educated guesses" that "fails to describe in sufficient detail the basis for Prysm's estimate . . . [or] the reliability of Prysm's conclusions."[34] The dissent notes that the Peddie Report is specifically problematic. "[T]here is no way to know from the [First Amended Complaint] *how* the Peddie Report determined NVIDIA's share of the cryptocurrency market" because Peddie's methodology is proprietary.[35] "This is a critical omission[] . . . [because w]ithout knowing the basis for this input, one cannot ascertain the reliability of the output."[36]

The dissent also explains that "[p]laintiffs cannot satisfy the PSLRA's heightened pleading requirements by pointing to another third-party report [the RBC Report] that itself fails to disclose material assumptions or methods of analysis."[37]

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[33] *Id.* at 947 (Sanchez, J., dissenting).

[34] *Id.* at 954.

[35] *Id.* at 953–54 (emphasis in original).

[36] *Id.* at 954.

[37] *Id.* (citing *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 837 (9th Cir. 2022) ("Plaintiffs cannot evade the PSLRA's exacting pleading standards by merely citing an expert who makes assertions about falsity based on questionable assumptions and unexplained reasoning.")).

SUMMARY OF ARGUMENT

While the Rule 10b-5 private right of action is implied, the requirements of the PSLRA are express, binding, and critical to limiting vexatious private securities litigation. The Ninth Circuit ignored those limitations in three significant ways, each of which warrants correction by this Court.

First, the PSLRA requires that plaintiffs plead *facts* to support allegations of falsity and scienter of the kind at issue here. But the Prysm Report is an opinion, not a fact. For that reason alone, it must be rejected as a basis for pleading falsity or scienter. Moreover, even if the Report is incorrectly accepted as a fact, ethical rules generally bar litigants from paying for facts. And even if ethical concerns are brushed aside, the fact of payment requires that the Report's already low level of credibility be further reduced. Either way, the Prysm Report cannot provide a basis for the complaint to survive a motion to dismiss.

Second, to satisfy the PSLRA's "strong inference" requirement, the Prysm Report must be more than "cogent"; it must be "at least as compelling as any opposing inference one could draw from the facts alleged."[38] But the complaint never pleads any information that would allow a court to determine whether its inferences are any more or less credible than inferences that could be generated by different experts applying different methodologies to different datasets. Thus, the Prysm Report, even if "cogent" and honestly constructed, could well be an idiosyncratic result of a problem that statisticians

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[38] *Tellabs,* 551 U.S. at 324.

describe as a "garden of forking paths." The complaint and the panel's opinion both fail to address the comparative nature of the strong inference requirement, and pleading cogency alone is clearly insufficient.

Third, the PSLRA requires pleading scienter with particularity. But as the opinion below demonstrates, plaintiffs and courts have identified a loophole that Justice Alito anticipated in his *Tellabs* concurrence, which now reads as prophetic. Dicta in the *Tellabs* majority opinion suggests that courts "should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the 'strong inference' requirement."[39] But as Justice Alito warned, that language could "undermine[] the particularity requirement's purpose of preventing a plaintiff from using vague or general allegations in order to get by a motion to dismiss."[40] The panel in this case did just that, improperly relying on the nonparticularized allegations in the Prysm Report to support scienter even though that Report has no valid place in the analysis because of the PSLRA's requirements.

The thoughtful dissent below gets it right. Affirming the Ninth Circuit's decision will chart a roadmap for new forms of costly and abusive litigation that Congress specifically intended the PSLRA to constrain. This Court should reverse.

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[39] *Id.* at 334 (Alito, J., concurring).

[40] *Id.*

ARGUMENT

I. THE PSLRA IMPOSES CRITICAL LIMITS ON PRIVATE SECURITIES LITIGATION

The PSLRA is a critical safeguard in private securities fraud litigation, carefully balancing the need to deter and punish fraud with the imperative to protect companies and individual defendants from frivolous lawsuits created by a judicially implied cause of action. Enacted in response to growing concerns about abusive litigation practices, the PSLRA significantly altered the dynamics of private securities fraud class actions by imposing "formidable" pleading standards designed to weed out frivolous, vexatious litigation at the threshold.[41] Those well-considered limitations are binding on courts and must be diligently enforced.

A. The Implied Rule 10b-5 Private Right Of Action Must Be Narrowly Construed

Private securities fraud litigation rests on a shaky foundation because the Rule 10b-5 private right of action is implied, not express.[42] Congress never intended to create a private right of action when it enacted Section 10(b) in 1934, and this Court has "made no pretense that it was Congress'

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[41] *Ohman*, 81 F.4th at 947 (Sanchez, J., dissenting) (quoting *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 765 (9th Cir. 2023) (quoting *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1055 (9th Cir. 2008))).

[42] For a history of Section 10(b) and of Rule 10b-5, *see* Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961 (1994).

design to provide" such a remedy.[43] As this Court acknowledges, "it would be disingenuous to suggest that either Congress in 1934 or the . . . Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5."[44]

The Commission also never intended to create a private right of action when it adopted Rule 10b-5 in 1942. "[N]obody at the Commission table gave any indication that he was remotely thinking of civil liability" in actions by private parties.[45] The Commission simply sought to create for itself a cause of action that would allow it to prosecute fraud in the purchase of securities, and not just fraud in the sale.[46] In short, neither Congress nor the

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[43] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 358–59 (1991). *See also Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 164 (2008) ("The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes."); *Blue Chip Stamps*, 421 U.S. at 729.

[44] *Blue Chip Stamps*, 421 U.S. at 737.

[45] LOUIS LOSS, ET AL., FUNDAMENTALS OF SECURITIES REGULATION 1559 (8th ed. 2023).

[46] Milton V. Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law 793, 922 (1967); Sec. Exch. Act Rel. No. 34-3230 (May 21, 1942) ("The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase."). The Commission's Release says nothing about creating or implying a private right of action, and the Commission's own wording states that the rule is "administered by the Commission," thus negating any inference that the Commission intended to create a private right. *See* Grundfest, *supra* n.42, at 979–81.

Commission anticipated the "judicial oak which has grown from little more than a legislative acorn."[47]

The implied private right under Rule 10b-5 is thus a creature of the judicial imagination first recognized in 1946.[48] Although current implied-rights doctrine would reject the implication of a private right from the original text,[49] the right's existence is today "beyond peradventure."[50] Subsequent congressional action, including the PSLRA's adoption, can also be viewed as ratifying the Rule 10b-5 implied private right of action.[51]

But ratifying an implied right's existence does not support its expansion. To the contrary, Rule 10b-5's status as an implied right means that it is to be construed narrowly. When Congress adopted the

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[47] *Blue Chip Stamps,* 421 U.S at 737.

[48] *See Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946).

[49] *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress."); *see also Egbert v. Boule*, 596 U.S. 482, 503 (2022) (Gorsuch, J., concurring) ("To create a new cause of action is … a power that is in every meaningful sense an act of legislation…. It has no place in federal courts charged with deciding cases and controversies under existing law."); Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 Bus. Lawyer 307, 362 (2014).

[50] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983).

[51] *See Stoneridge*, 552 U.S. at 165 ("Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action."); *id.* at 166 ("It is appropriate for us to assume that when § 78u–4 was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U. S. 353, 381–82 n.66 (1982); *cf. J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

PSLRA, "Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further."[52]

B. Federal Class Action Securities Fraud Litigation Is Vexatious, Common, And Expensive

Justice Powell famously observed that "the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them."[53] That observation is now almost fifty years old but continues to ring true because "a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment."[54] This Court has repeatedly recognized this danger and has consistently cabined the scope of the implied Section 10(b) private right of action.[55]

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[52] *Stoneridge*, 552 U.S. at 166.

[53] *Blue Chip Stamps*, 421 U.S. at 740.

[54] *Id.*

[55] *See, e.g., Santa Fe*, 430 U.S. at 479 ("We thus adhere to the position that Congress by s 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement.") (internal quotation marks omitted); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 285 (1992) (O'Connor, J., concurring); *Kircher v. Putnam Funds Trust*,

Federal class action securities fraud litigation nevertheless remains common. Stanford's Securities Class Action Clearinghouse identifies 6,525 unique federal class action securities complaints filed between January 1, 1996, the PSLRA's effective date, and December 31, 2023.[56] That equates to roughly 233 filings per year and suggests that about four companies are sued in private securities fraud actions every week of the year, even with the PSLRA in full force.[57]

Cornerstone Research also documents that approximately 7.1 percent of all S&P 500 companies, typically the largest listed entities in United States markets, representing 10.1 percent of total S&P 500 capitalization, were sued in 2023.[58] Thus, if 2023 is a precursor of litigation trends over the coming decade then, over that ten-year span, a dollar value equal to

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403 F.3d 478, 484 (7th Cir. 2005), *vacated and remanded*, 547 U.S. 633 (2006); *see also Dabit*, 547 U.S. at 80 (quoting *Blue Chip Stamps*, 421 U.S. at 739) (Private securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."); *Tellabs*, 551 U.S. at 313 ("Private securities fraud actions, however, if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) ("Litigation under 10b–5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements.").

[56] Cornerstone Research, Securities Class Action Filings: 2023 Year in Review, p. 41, available at https://bit.ly/3yOtN9l.

[57] 233 ÷ 52 = 4.48.

[58] Cornerstone Research, Securities Class Action Filings: 2023 Year in Review, at p. 36 (App'x 2A & 2B).

the S&P 500's entire market capitalization will be exposed to class action securities fraud litigation.

Federal class action securities fraud litigation is also expensive. The 2,199 settlements entered between the PSLRA's January 1, 1996, effective date and December 31, 2023,[59] had an aggregate value of approximately $141.2 billion, or $5 billion a year, adjusted for inflation and measured in 2023 dollars.[60] These settlement data understate defense expenses because they omit attorney's fees and the value of management time and distraction. They also omit the value of plaintiffs' counsel's efforts in failed class action securities fraud litigation.[61] They nevertheless illustrate the high stakes of modern securities class action litigation and the need for Congress and courts to carefully police wasteful and abusive suits.

C. The PSLRA Heightens Pleading Standards

The PSLRA is Congress's principal response to abusive private securities fraud litigation. The "House Conference Report accompanying what would later be enacted as the [PSLRA] . . . identified

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[59] Cornerstone Research, Securities Class Action Settlements: 2023 Review and Analysis, at p. 17.

[60] *Id.*

[61] Both plaintiffs' and defense counsel expend time and effort in litigating securities fraud class actions in the stages prior to settlement, for which these data do not fully account. "In 2023, cases took longer to settle. They also reached more advanced stages prior to resolution, including a smaller proportion of cases settled before a ruling on class certification compared to prior years. . . . Longer times to reach a settlement and more advanced litigation stages are [] typically correlated with greater case activity, as measured by the number of entries on the court dockets." *Id.* at p. 2.

ways in which the class-action device was being used to injure 'the entire U.S. economy.'"[62] According to the Report, "nuisance filings, targeting of deep-pocket defendants, [and] vexatious discovery requests . . . had become rampant in recent years."[63] These practices also chilled disclosures that the securities laws were designed to promote.[64] The PSLRA was thus "motivated in large part by a perceived need to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to exact large settlement recoveries."[65]

The PSLRA heightens pleading standards in a manner consciously intended to make it more difficult for complaints to survive motions to dismiss. Specifically, the PSLRA requires that plaintiffs "state with particularity all facts on which [the plaintiff's] belief is formed," as well as "facts giving rise to a strong inference that the defendant acted with the required state of mind."[66] These

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[62] *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104–369, p. 31 (1995)).

[63] *Id.*

[64] *See id.* (citing H.R. Conf. Rep. No. 104–369, at pp. 31–32).

[65] *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000); *see also In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 988 (9th Cir. 1999) ("Congress enacted the PSLRA to put an end to the practice of pleading fraud by hindsight.") (internal quotation marks omitted); *PR Diamonds, Inc. v. Chandler*, 91 F. App'x 418, 445 (6th Cir. 2004) ("The 'purpose' of the PSLRA is to screen out lawsuits having no factual basis, to prevent harassing strike suits, and to encourage attorneys to use greater care in drafting their complaints.").

[66] 15 U.S.C. § 78u–4(b)(1), 78u–4(b)(2)(A).

standards have been described as "formidable,"[67] and it is no secret that the PSLRA places special burdens on plaintiffs seeking to bring securities fraud class actions.[68] Indeed, "the strong inference standard unequivocally raised the bar for pleading scienter."[69]

As summarized above, the PSLRA imposes three significant pleading requirements on every complaint governed by its provisions: (1) the complaint must be based on facts, not opinions; (2) allegations of scienter must support a "strong inference" of that mental state; and (3) the facts supporting falsity and scienter must be pled with particularity.

II. THE NINTH CIRCUIT IMPROPERLY LOWERED THE PSLRA'S PLEADING BAR

The decision below fails all three elements of the PSLRA's test, and each failure provides an independent basis for reversal by this Court.

A. The Prysm Report Is Opinion, Not "Fact"

The PSLRA requires that complaints plead facts and nowhere supports pleadings based on opinion.[70] The Prysm Report is not a fact. It is the opinion of

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[67] *Ohman*, 81 F.4th at 947 (Sanchez, J., dissenting) (quoting *Glazer*, 63 F.4th at 765 (quoting *Metzler*, 540 F.3d at 1055)).

[68] *See Dabit*, 547 U.S. at 81–82.

[69] *Tellabs*, 551 U.S. at 321 (cleaned up) (citing H.R. Conf. Rep. No. 104–369, at p. 41).

[70] *See* 15 U.S.C. § 78u–4(b)(1), (2)(A) (the complaint must "state with particularity all *facts*" supporting the belief that "the statement is misleading" and "*facts* giving rise to a strong inference" of scienter) (emphasis added).

two Harvard Ph.D.s who work for an economic consulting firm, and who never claim to have seen any internal NVIDIA documents or to have communicated with any NVIDIA personnel. Because the Prysm Report is an opinion, not a "fact," it cannot serve as the basis for a complaint subject to the PSLRA. This observation is alone a sufficient basis upon which to vacate the opinion below.

The Prysm Report's status as an opinion, not as a fact, is compelled by Federal Rule of Evidence 702, which states that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." The Prysm Report's authors are qualified only because of their purported expertise in matters related to blockchain operations. They have no factual basis on which to testify, other than expert opinion rooted entirely in information that was publicly available. Their testimony therefore exists only in the "form of an opinion," and not as a fact. The absence of any factual basis beyond publicly available information underscores that the Prysm Report can be categorized only as opinion testimony.

No other circuit would have allowed these *post-hoc* revenue estimates by outsiders to plead securities fraud.[71] Many district courts, too, would

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[71] *See Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 285–86 (5th Cir. 2006); *see also* Pet. at 27–28. Even the First Circuit, which aligns with the Ninth Circuit in allowing non-particularized descriptions of internal corporate documents to support scienter, did not rely

have rejected plaintiffs' claims.[72] It is also not clear that any court would admit the plaintiffs' expert report at a later stage of litigation. The complaint nowhere alleges that the Prysm Report's methodology has an analog in peer-reviewed literature and never describes the authors' qualifications beyond holding Ph.D.s.[73]

Thus, the panel not only accepted opinion evidence as fact, but it accepted potentially *inadmissible* opinion evidence as fact. These evidentiary complications are exactly why courts have refused to allow such opinions to masquerade as facts that might satisfy the PSLRA's pleading standards.[74]

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on this type of outside expert opinion to establish what those documents purportedly contained. *See In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 206–11 (1st Cir. 2005); *see also* Pet. at 22–23.

[72] *See, e.g.*, *In re Under Armour Sec. Litig.*, 409 F. Supp. 3d 446, 455 (D. Md. 2019) ("Expert opinions generated for purposes of supporting Plaintiffs' theories in a [securities fraud complaint] do not warrant the assumption of truth."); *Ong v. Chipotle Mex. Grill, Inc.*, 294 F. Supp. 3d 199, 222 (S.D.N.Y. 2018) (refusing to consider "any conclusory allegations in the [securities fraud complaint] that are based on the [expert opinion]"); *see also Lerner v. Nw. Biotherapeutics*, 273 F. Supp. 3d 573, 590 (D. Md. 2017); *In re Ashworth, Inc. Sec. Litig.*, No. 99CV0121-L(JAH), 2001 WL 37119391, at *3 (S.D. Cal. Dec. 3, 2001); *DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1221–22 (S.D. Cal. 2001).

[73] *See Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 592–93 (1993).

[74] *See, e.g.*, *Blackwell*, 440 F.3d at 285–86 ("[A]llowing plaintiffs to rely on an expert's opinion in order to state securities claims requires a court to 'confront a myriad of complex evidentiary issues not generally capable of resolution

The Prysm Report's status as made-for-litigation testimony warrants emphasis. The complaint describes Prysm as "retained" by plaintiffs, and petitioners indicate that plaintiffs paid the Prysm Group for the Report, which is consistent with industry standards; expert consulting firms preparing reports for use in litigation generally do not work for free.[75] *Ashcroft v. Iqbal* supports that inference by calling on courts to rely on "judicial experience and common sense" when ruling on motions to dismiss.[76] Indeed, Federal Rule of Civil Procedure 26(a)(2)(B)(vi) operates from that presumption as it requires that experts report the compensation they receive for their testimony.

Even if the Prysm Report were miscategorized as fact, payments for the Report's contents would require that it be ignored. Plaintiffs are free to compensate experts for opinion reports, and free to compensate fact witnesses for time and expense in traveling to testify and in testifying.[77] But plaintiffs cannot compensate fact witnesses for the substance of their testimony.[78] Facts are not and should not

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at the pleading stage' . . . [and] might require ruling on the expert's qualifications.") (quoting *DeMarco*, 149 F. Supp. 2d at 1221).

[75] Compl. ¶ 143; *see, e.g.*, Opening Br. at 13 ("Plaintiffs attempted to plead falsity by paying an expert firm, the Prysm Group, to supply an opinion . . . .").

[76] 556 U.S. 662, 679 (2009).

[77] 18 U.S.C. § 201(d).

[78] *Id.* § 201(b), (c); ABA Model Rule of Professional Conduct 3.4(b); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994), *aff'd* 117 F.3d 1328, 1335 n.2 (11th Cir. 1997) (The

be for sale. And, even if one brushes aside ethical concerns raised by counsel paying "fact" witnesses for the substance of their "fact" testimony, the simple fact of the payment would require that the already questionable foundation for the Prysm Report be further discounted, just as the testimony of confidential witnesses in securities fraud litigation is commonly discounted because of indicia suggesting a lack of credibility.[79]

Plaintiffs are thus trapped. If the Prysm Report is not a fact, it cannot be relied upon in the complaint. If the Report is a fact, its ethical concerns are obvious, and its paid pedigree requires that it be further discounted. Either way, the complaint must be dismissed.

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law prohibits "a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so."); *see also Rocheux Intern. of New Jersey v. U.S. Merchants Fin. Grp., Inc.*, 2009 WL 3246837, at *4 (D.N.J. 2009) ("Mr. Gutierrez was a fact witness, and his payment by Plaintiff's counsel clearly runs afoul of the longstanding prohibition against payment of fact witnesses."); *Ward v. Nierlich*, 2006 WL 5412626, at *4 (S.D. Fla. 2006) (noting that, when a witness is paid, "the witness has an incentive to testify favorably for the party paying him").

[79] *See Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 753, 757 (7th Cir. 2007) ("[A]llegations from confidential witnesses must be discounted" in securities fraud cases, and "[u]sually that discount will be steep.") (internal quotation marks omitted); *Institutional Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 263 (3d Cir. 2009) ("If anonymous source allegations are found wanting with respect to [sufficient indicia of reliability] . . ., then we must discount them steeply.").

Finally, the Ninth Circuit's decision to accept paid opinion evidence as fact conflicts with the PSLRA's express goal of combating abusive securities lawsuits.[80] The decision below can only invite a flood of complaints that rely on paid outside experts to craft *post-hoc* analyses, with no grounding in first-hand knowledge, alleging that corporate insiders must have known the facts that the experts think they should have known.

This concern is not speculative. Plaintiffs in other cases have already filed complaints relying on expert reports to support allegations of fraud and scienter.[81] Well-resourced plaintiffs' counsel thus will be able to buy their way out of the PSLRA's pleading requirements. This is assuredly not what Congress intended when drafting the PSLRA.

B. The Expert Report Does Not Support A "Strong Inference Of Scienter"

The Ninth Circuit further erred in finding that the Prysm Report supports a "strong inference" of scienter. *Tellabs* holds that courts reviewing a scienter allegation "must engage in a comparative evaluation," and consider "competing inferences rationally drawn from the facts alleged."[82] A plaintiff satisfies the PSLRA's "[e]xacting pleading requirements" only if the inference of scienter is "cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[83]

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[80] *See Dabit*, 547 U.S. at 81.

[81] *See, e.g.*, Am. Compl. ¶¶ 66–67, 261–62, *Boukadoum v. Acelyrin, Inc.*, No. 2:23-cv-09672 (C.D. Cal. Mar. 26, 2024).

[82] 551 U.S. at 314.

[83] *Id.* at 313, 324.

Despite relying on an expert opinion to find scienter,[84] the decision below never engages in *Tellabs*' comparative evaluation by asking whether other revenue estimates would be "as compelling" as those offered by that expert.[85]

Nor was it even possible for the Ninth Circuit to engage in this comparative analysis. The complaint below asserts that the expert report's approach was "conservative," that its "third-party data sources" were "credible," and that its analysis was "rigorous."[86] But *Tellabs* never concludes it is sufficient that a complaint is conservative, credible, rigorous, or any other synonym for "cogent." The requirement is far more exacting. The inference must be "at least as compelling" as any other possible inference.[87] But the complaint below never supports any inference that the expert's sources are more credible than other sources, or that its methodologies are superior to other methodologies that also generate revenue estimates. The complaint therefore cannot allege that the expert's conclusion is "at least as compelling as any opposing inference" because it never addresses any opposing inference.[88]

The complaint's silence on this point implicates a larger analytic issue now attracting attention

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[84] *See Ohman*, 81 F.4th at 940.

[85] 551 U.S. at 314.

[86] Compl. ¶¶ 147–48. As discussed below, these allegations do not describe the expert's analysis with sufficient particularity to conclude that it was, in fact, conservative, credible, or rigorous. *See infra* at 29–31.

[87] *Tellabs*, 551 U.S. at 314.

[88] *Id.*

among statisticians: the problem raised by the "garden of forking paths."[89] When testing a hypothesis—such as whether NVIDIA's crypto-related revenues were higher than represented—researchers make many decisions, including which data sets to use and which statistical techniques to apply. All of these choices can affect the ultimate conclusion. To illustrate, a recent study compared the conclusions of numerous research teams, who had "analyzed the same data set to answer the same research question," and found that there was no consensus in either the selection of statistical techniques or outcome.[90]

Moreover, researchers (consciously or unconsciously) tend to make analytic decisions that support their desired result.[91] This problem is amplified if researchers are compensated and know that their work has value to a paying client only if it supports a client's desired conclusion.

To make the problem concrete in the context of this litigation, assume there are ten different

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[89] *See, e.g.*, Andrew Gelman & Eric Loken, *The Statistical Crisis in Science*, 102 Am. Scientist 460 (2014).

[90] Raphael Silberzahn, *et al.*, *Corrigendum: Many Analysts, One Data Set: Making Transparent How Variations in Analytic Choices Affect Results*, 1(3) Advances in Methods and Practices in Psychological Sci. 337, 338, 343–47 (2018); *see also* Gelman & Loken, 102 Am. Scientist at 464 (suggesting that "choices in analysis and interpretation are data dependent and would have been different given other possible data").

[91] *See* Joseph P. Simmons, *et al.*, *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22(11) Psychological Sci. 1359, 1359–60 (2011).

credible databases and ten different methodologies that can be used to estimate the effects of crypto-mining demand. For simplicity, assume that the combination of these ten databases and ten methodologies generates one hundred different forms of analysis—ten different analyses of ten different databases. Assume further that the plaintiffs' expert report is a legitimate analysis of one of these one hundred possibilities. It is, as statisticians would say, one path in a garden of forking paths. But what of the other 99 paths that other equally competent analysts might have followed? *Tellabs* commands analysis of this broader question, but plaintiffs fail to even recognize the challenge.

This concern is amplified by the fact that plaintiffs' counsel could well have approached multiple different experts before finding one that would reach their desired conclusion. Plaintiffs' counsel could also have coached the paid experts as to the desired outcome. The complaint addresses none of these possibilities, and leaves open the possibility that plaintiffs' counsel guided the experts through "the garden of forking paths" to an outcome most favorable to plaintiffs' claims.

Thus, even if the Prysm Report is credible, that is not enough. The complaint pleads no facts suggesting that its analysis is at least as credible as opposing conclusions that can be reached by other experts addressing the same question.

C. The Expert Report Is Not Pled With Requisite Particularity

The Ninth Circuit's third error was to ignore the PSLRA's "particularity" requirement[92] in a manner that confirms the prophetic nature of Justice Alito's *Tellabs* concurrence. Justice Alito explained that the plain language of the PSLRA requires that "a strong inference" can arise only from facts stated "with particularity."[93] "It follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met."[94]

Justice Alito's concern was a response to dicta in the *Tellabs* majority opinion stating that "'omissions and ambiguities' merely 'count against' inferring scienter, and that a court should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the 'strong inference' requirement."[95] Justice Alito emphasized that this articulation of the standard would "undermine[] the particularity requirement's purpose of preventing a plaintiff from using vague or general allegations in order to get by a motion to dismiss."[96] Justice Alito thus cautioned against undifferentiated forms of analysis that consider a combination of factors, some or all of which are not pled with sufficient particularity, as evidence supporting a strong inference of scienter.

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92 15 U.S.C. § 78u–4(b)(1), (2)(A).

93 *Tellabs*, 551 U.S. at 334 (Alito, J., concurring).

94 *Id.*

95 *Id.*

96 *Id.*

But precisely that form of objectionable analysis is central to the holding below. Even though the expert opinion was the only source of the critical revenue estimates relied upon by the Ninth Circuit, the complaint "fail[ed] to describe [the expert]'s assumptions and analysis with sufficient particularity to establish a probability that its [revenue] conclusions are reliable."[97] Among other flaws, the complaint failed to describe the "proprietary analytic models" used to estimate NVIDIA's market share, which was one step in the expert's ultimate revenue estimate.[98] "Without knowing the basis for this input, one cannot ascertain the reliability of the output."[99] An identical critique applies to the hashrate estimates.

But instead of excluding the Prysm Report because of its lack of particularity, the panel doubled down and put critical emphasis on its significance. Indeed, in an attempt to bolster that defectively pled expert opinion, the Ninth Circuit pointed to other generalized allegations—none of which confirmed the experts' specific revenue estimates.[100] Thus, rather than relying on

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[97] *Ohman*, 81 F.4th at 953 (Sanchez, J., dissenting); *see also* Pet. at 29–30 (describing the expert's questionable assumptions).

[98] *Ohman*, 81 F.4th at 953–54 (Sanchez, J., dissenting).

[99] *Id.* at 954.

[100] *See id.* at 932 (citing the similar results obtained by RBC; NVIDIA employees' confirmation "that crypto miners purchased enormous quantities of GeForce GPUs, and that revenues from purchases of GeForce GPUs were counted as Gaming-segment rather than OEM-segment revenues"; and other events in the market to confirm the "essential correctness of Prysm's analysis").

particularized allegations, the Ninth Circuit relied on a combination of "vague or general allegations,"[101] and thereby "stripped [the particularity requirement] of all meaning."[102] This decision will permit plaintiffs to "circumvent" the PSLRA's "important" protections against abusive litigation—just as Justice Alito predicted 17 years ago.[103] Although it would have been preferable for the Court to avoid the problem at that time, the Court can now correct the misimpression left by *Tellabs* on a prospective basis.

CONCLUSION

The Court should reverse the decision below.

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[101] *Tellabs*, 551 U.S. at 334 (Alito, J., concurring).

[102] *Id.*

[103] *Id.*

Respectfully submitted,

CHRISTOPHER G. MICHEL
Counsel of Record
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
1300 I Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 538-8308
christophermichel@
quinnemanuel.com

CAITLIN E. JOKUBAITIS
MIRIAM R. GEORGE
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd
Floor
New York, New York 10010
(212) 849-7000
caitlinjokubaitis@
quinnemanuel.com
miriamgeorge@
quinnemanuel.com

Counsel for *Amicus Curiae*

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