No. 23-970

In the Supreme Court of the United States

NVIDIA CORPORATION, ET AL.,

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 AMICI CURIAE SCHOLARS OF CIVIL PROCEDURE SUPPORTING RESPONDENTS

Jeremy A. Lieberman
Emma Gilmore
POMERANTZ LLP
600 3rd Ave.
New York, New York 10016

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com
Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

Amici are legal scholars who teach and write in the area of civil procedure. They share a deep concern for the proper development of the law in these areas. They write here to discuss the history of pleading standards requiring fraud to be pleaded with particularity and the longstanding distinction between matters of pleading and matters of evidence—both at common law and under the Federal

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus or his counsel made a monetary contribution intended to fund the brief 's preparation or submission.

Rules. And they explain how this history bears on the questions before the Court. Amici include:

Arthur R. Miller is the University Professor and Warren E. Burger Professor of Constitutional Law in the Courts at the New York University School of Law, and one of the nation's leading scholars in the field of civil procedure. He is co-author, along with the late Charles Alan Wright, of *Federal Practice and Procedure*, one of the most-often cited and well-regarded legal treatises in existence. He is the recipient of five honorary doctorates and has served as a member and reporter of the Advisory Committee of Civil Rules of the Judicial Conference of the United States, as reporter and advisor to the American Law Institute, and as a member of a special advisory group to the Chief Justice of this Court. Professor Miller has also argued six cases before this Court, including *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the leading case on the particularity standards of the Private Securities Litigation Reform Act of 1995.

Adam Steinman is professor of law at the Texas A&M School of Law. He is an award-winning teacher and scholar whose articles have been published in dozens of prominent law journals including the Stanford Law Review, N.Y.U. Law Review, and Virginia Law Review among many others. Professor Steinman is also a co-author of two leading casebooks—*Civil Procedure: Cases and Materials* (13th edition) (with Jack Friedenthal, Arthur Miller, John Sexton, Helen Hershkoff & Troy McKenzie) and *Federal Courts: Cases, Comments and Questions* (9th edition) (with Martin Redish, Suzanna Sherry, James Pfander & Steven Gensler)—and an author on the Wright & Miller *Federal Practice & Procedure* treatise. Professor Steinman is a member of the American Law Institute. And

he has taught a range of courses, including Civil Procedure, Complex Litigation, Federal Courts, and International Human Rights Law.

Robin Effron is the Dean's Research Scholar and Professor of Law at the Brooklyn Law School. Professor Effron teaches civil procedure, litigation, and international business law courses. Her articles on procedure and federal courts have appeared in many leading law reviews and have been cited by several state, federal and foreign courts.

Myriam Gilles is the Paul R. Verkuil Research Chair and Professor of Law at the Benjamin N. Cardozo School of Law. She is the #5 most cited civil procedure professor in the country and specializes in class actions and aggregate litigation, structural reform litigation, and tort law. She has testified multiple times before Congress on consumer protection issues and arbitration and served as Cardozo's vice dean from 2016 to 2018.

Suzette M. Malveaux is the Roger D. Groot Professor of Law at the Washington & Lee University School of Law. Her scholarship explores the intersection of civil rights and civil procedure, as well as access to justice issues. Professor Malveaux is a member of the American Law Institute and former Chair of the American Association of Law School's Civil Procedure Section.

Alan B. Morrison is the Lerner Family Associate Dean for Public Interest & Public Service at the George Washington University Law School. He teaches civil procedure and constitutional law, and previously taught at Harvard, NYU, Stanford, Hawaii, and American University law schools. He is a member of the American Academy of Appellate Lawyers and was its president in 1999–2000.

Among other positions, he served as an elected member of the Board of Governors of the District of Columbia Bar, a member and then senior fellow of the Administrative Conference of the United States, a member of the American Law Institute, and a member of the Committee on Science, Technology & Law of the National Academy of Science. He has argued 20 cases before this Court. For most of his career, he worked for the Public Citizen Litigation Group, which we he co-founded and directed for over 25 years.

David C. Vladeck holds the A.B. Chettle Chair in Civil Procedure at Georgetown Law. Professor Vladeck teaches civil procedure, federal courts, and a practicum on privacy and technology (taught jointly with MIT), and directs the Civil Litigation Clinic, a student clinic that handles trial court litigation focused on public-interest cases. He is a Senior Fellow of the Administrative Conference of the United States and an elected member of the American Law Institute. As director of the Public Citizen Litigation Group, he also briefed and argued several cases before this Court and more than sixty cases before federal courts of appeals and state courts of last resort.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important opportunity to consider the development of particularity standards in pleading and the important distinction that English and American law has consistently maintained between pleading allegations and proving elements. No less an authority than Justice Joseph Story once cautioned that the requirement to plead fraud with particularity should not be made so demanding that it crosses the line between "matters of allegation," on the one hand, and "matters of evidence" on the

other. Joseph Story, *Commentaries on Equity Pleadings* § 252 (1838); *see Swierkiewicz* v. *Sorema*, 534 U.S. 506, 510 (2002) (distinguishing between "an evidentiary standard" and a "pleading requirement").

Requirements that plaintiffs must plead certain matters with particularity have a long history that dates back to the common law and can be traced in this country through the adoption of the Federal Rules of Civil Procedure and incorporation into statutes like the Private Securities Litigation Reform Act of 1995. Pub. L. No. 104-67, 109 Stat. 737. That history bears on the particularity standards at issue in this case and reveals that the purpose of particularized pleading is very different than what Petitioners in this case believe it to be.

Historically, particularity requirements were meant to serve the same basic purpose as all pleading standards: to provide defendants with the notice required to defend against the accusations. But they arose out of a recognition that certain claims, like fraud, require providing the defendant with more detail than others to give the defendant notice—because mere generalized pleading that "the defendant committed fraud" provides defendants with little to defend against. And that means pleadings of fraud under the Private Securities Litigation Reform Act (PSLRA) need only contain sufficient particularity necessary to provide such notice. That turns out to be a modest burden, which does not require plaintiffs to tell defendants what they already know, including what their own documents say.

Petitioners ignore this notice-providing function of particularity standards, contending instead that particularity standards came into existence only because of fraud's "disfavored" status as a legal claim, which owes to

the relative ease of making fraud accusations and the potential reputational risks that attend such accusations. Petitioners insist that this disfavored status justifies a series of bright-line rules imposing extraordinary burdens on plaintiffs pleading claims of securities fraud under the PSLRA. They maintain that plaintiffs *must* plead the actual "contents" of any "internal company documents" upon which they rely to prove scienter—even if plaintiffs do not have access to those documents. And they further insist that plaintiffs *may not* support their pleadings made on information and belief with any sort of expert analysis.

Yet particularity's history tells a very different story. Because the purpose of particularity in pleading was primarily to give notice to the defendant, particularity requirements do not require plaintiffs to make public displays of the evidentiary bases of their fraud accusations before being admitted inside the courthouse door. Nor do they require plaintiffs to reverse engineer every step of a company's thought process, or the content of any document they encounter, before being allowed to allege fraud. Nor do particularity requirements impose some sort of prophylactic thumb on the scale to protect defendants against potential strike suits at the risk of throwing out meritorious claims of deserving plaintiffs simply because they could not obtain access to internal company documents before discovery. And particularity standards certainly should not become a one-way ratchet of demands for bright-line rules demanding ever more particularity.

Instead, because particularity standards exist to convey notice, the only particularity that they require is enough to give the defendant notice of which parts of its financial or other statements are fraudulent so that it can begin to prepare its defense. And that should not require

the plaintiff to prove the specific contents of internal documents of the defendant that the defendant already knows and plaintiffs may not be able to obtain.

History also refutes any notion that the PSLRA prohibits plaintiffs from relying on expert analysis in pleading matters of falsity on information or belief. That idea confuses the domains of evidence and pleading. From common law until now, standards of pleading have not required plaintiffs to do anything other than allege certain factual matters that, if proven true, would support the plaintiff's claims. The particular type of proof that plaintiffs would use to prove that factual matter is irrelevant at the pleading stage. And if plaintiffs do offer expert analysis to support their averments made upon information and belief, that support should hardly be shunned. It should be welcomed.

Accordingly, it is important that the Court reject Petitioners' intent to reinvent particularity standards and reject the extraordinary burdens they would impose upon plaintiffs pleading securities fraud under the PSLRA. That is the result that best respects the history that Congress drew upon in fashioning the PSLRA. That is the only result that preserves the balance that Congress sought to achieve in the PSLRA between "screen[ing] out frivolous cases" *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 324 (2007), and preserving "[p]rivate securities litigation," as "an indispensable tool" for "defrauded investors" to "recover their losses without having to rely upon government action"—"promot[ing] public and global confidence in our capital markets and help[ing] to deter wrongdoing." H.R. Rep. No. 104-369, at 31 (1995) (Conference Report).

ARGUMENT

I. The history of particularity requirements refutes Petitioners' demand that securities-fraud plaintiffs plead the contents of internal company documents relied on to allege scienter.

There is a long history of judicial efforts to discern the boundaries of particularity requirements—one that dates back to the common law and continues today. That entire history bears on interpreting the particularity requirements in the PSLRA because that statute and the Federal Rules both adopted the common-law rule courts had long applied. And that history ultimately cannot be squared with Petitioners' demand that securities-fraud plaintiffs plead the contents of every internal company document they rely upon to allege scienter.

A. The history of particularity requirements since common law

The requirement that fraud must be proven with particularity has roots in the common law. And those common-law origins provide important contours to the meaning of the words "with particularity" as adopted by Congress in the PSLRA.

1. Historically, courts of law did not require pleading fraud with particularity. "[A] general plea" that the plaintiff was harmed by "'fraud and misrepresentation,'" for example, was "sufficient on the ground that fraud usually consists of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth." Joseph Chitty, *A Treatise on Pleading and Parties to Actions* 537 (1867); *see also* James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (2d ed.

1836) (discussing the pleading of fraud in several contexts without mentioning a special pleading standard); *Ross* v. *Braydon*, 32 Ky. 161, 161 (1834) (citing Chitty and concluding that "[a] plea, to an action upon a note, alleging in general terms, that it was obtained by fraud and misrepresentation, is good, without stating the particulars of the fraud—which had, in fact, better be omitted").

Particularity requirements instead arose in equity—often through attempts to reopen transactions or set aside titles. *See Jones* v. *Bolles*, 76 U.S. 364, 369 (1869) ("Equity has always had jurisdiction of fraud, misrepresentation, and concealment."). As Justice Story explained in his treatise on equity pleading, "where a Bill seeks a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point, and state particular acts of fraud." Joseph Story, *Commentaries on Equity Pleadings* § 251 (1838). This Court likewise recognized well over a century ago that "a general averment of fraud can be no foundation for an equity." *First Nat. Bank* v. *Cooper, Vail & Co.*, 87 U.S. 171, 172 (1873). Justice Miller wrote back in 1880 that "it is too clear for argument" that a party pleading fraud or mistake "should set out the particulars of the fraud, or the manner in which the mistake occurred." *U.S.* v. *Atherton*, 102 U.S. 372, 374. And just five years later, the Court complained that the plaintiff's bill was "full of the words 'fraudulent' and 'corrupt,' and general charges of conspiracy" but noted that "it is not sufficient to plead fraud in general terms. The specific statements and acts relied upon as constituting the fraud must be set out." *Van Weel* v. *Winston*, 115 U.S. 228, 237-38, 247 (1885).

But even as courts in equity were the first to impose particularity requirements, they did not require plaintiffs

to plead "all the minute facts" of a transaction to satisfy particularity—rather, "the general statement of a precise fact [was] often sufficient," and circumstances that would "confirm or establish it" were "matters of evidence," not "allegation." Story, *Commentaries on Equity Pleadings* § 252 (1838).

2. By Petitioners' account, particularity requirements arose primarily because of fraud's "historically disfavored" status. Pet. 23. They insist that courts first imposed particularity requirements as the result of the fact that "[c]harges of fraud are easily made" and hard to defend, because the "lapse of time necessarily obscures the truth and destroys the evidence of past transactions." *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849). Petitioners also note that fraud accusations were recognized to be fraught with potential for "reputational harm." *Cozzarelli* v. *Inspire Pharms. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008) (Wilkinson, J.). Petitioners insist that this "disfavored" status historically justified imposing special burdens on plaintiffs attempting to prove fraud. Petitioners therefore maintain that there is a historical lineage behind their demand that plaintiffs must prove the contents of any internal company documents relied upon to prove scienter to comply with the PSLRA's particularity standard in 15 U.S.C. § 78u-4(b)(1). But history does not back up this contention.

Instead, particularity requirements arose primarily from a different purpose—the true purpose of all pleading: to "give the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Tellabs*, 551 U.S. at 319 (quoting *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346 (2005)). Particularity requirements were designed to address specific problems of

notice confronted by defendants facing allegations of fraud.

Particularity is necessary to plead fraud because fraud accusations by their nature require giving the defendant more information than other types of claims. For example, it does not take much to give a defendant fair notice of a car wreck: A pleading that merely references the time, location, and occurrence of the crash, and that it arose from the defendant's negligence, should normally suffice.

By contrast, a pleading that merely avers generally that the defendant committed fraud in a transaction will not necessarily inform the defendant of the charge. Parties may make many statements in the course of a transaction, and the defendant may not know exactly which ones are alleged to have caused injury—or how. A generalized allegation that "the Defendant committed fraud in relation to the transaction" will not suffice. Instead, to answer a fraud claim, a defendant must be permitted some understanding of the "who, what, when, where, and why" of the statements alleged to be fraudulent. 5A Wright & Miller, *Federal Practice and Procedure: Civil* § 1297 (quoting *DiLeo* v. *Ernst Young,* 901 F.2d 624, 627 (7th Cir. 1990)). And particularity requirements were imposed to ensure defendants were provided with this necessary detail.

To allow otherwise would enable plaintiffs to skate past the pleading stage of a lawsuit, and subject defendants to mounting a defense, without any understanding of what they did wrong—or whether any fraud had occurred at all, and the plaintiff was suing them simply because the circumstances turned out badly. Pleading particularity requirements were therefore created to avoid what Judge Friendly famously called (in the securities context) "fraud

by hindsight": complaints based on mere speculation that "greater clairvoyance" "might have" avoided what later turned out badly. *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

To be sure, Petitioners' fraud-disfavoring justification for particularity enjoys some historical support. But particularity requirements were not originally born out of any need to protect defendants from abusive strike suits or risks of reputational harms. Certainly, avoiding such harms was seen as a salutary benefit of particularity. But that was not the reason that particularity requirements came into existence. These requirements therefore did not exist to require plaintiffs to make any sort of public justification to the world before subjecting a defendant to allegations of fraud.

Instead, it was particularity's notice-providing function, rather than any reputation-saving function, that ultimately lies behind the creation of particularity requirements and their development in English and early American history. Indeed, this notice-providing function is ultimately found in Petitioner's own cases. *See* Pet. Br. 23 (citing *State* v. *Johnson*, 1 D. Chip. 129, 130 (Vt. 1797) (stressing that "for fraud to be chargeable, * * * the facts constituting the crime must be set forth so definitely *that the Court can see what the crime is*." Otherwise the defendant "*cannot know how to prepare his defence*." *Id.* at 130 (emphasis added).

3. This notice-providing function of particularity requirements ultimately defines how much detail is necessary to satisfy them. As particularity requirements exist to provide notice, the plaintiff need only provide sufficient detail to provide the defendant notice—to overcome the

defendant's potentially faulty memory and help them understand which statements were alleged to be misleading or false, and which were alleged to have induced detrimental reliance in the recipient.

To English and early American courts, this did not require much detail at all. Particularity merely required that the plaintiff make a "general statement of a precise fact," not "set forth all the minute facts." Story, *Commentaries on Equity Pleadings* § 252 (1838). The plaintiff must be specific but need not be prolix in stating details. And the "circumstances," "which go to confirm or establish it need not be" "minutely charged"—reflecting the division between matters of "evidence" rather than matters of "allegation." *Id.*

4. And to convey some idea of just how undemanding the particularity requirement was, in the first century of American law, no court in a recorded decision appears to have used it to deem a pleading insufficient to plead a claim of fraud. More often, it was invoked instead to defeat claims on laches or limitations grounds—because fraud claims in equity often sought to reopen settled transactions, court judgments, or to bring claims that would otherwise be barred by the statute of limitations in a court of law. And for fraud claims in equity, the statute of limitations did not begin to run until the victim discovered his injury. *See, e.g.*, *Sherwood* v. *Sutton*, 21 F.Cas. 1303 (No. 12,782) (C.C.D.N.H. 1828) (Story, J.). So one vital reason for the particularity requirement was to ensure that the plaintiff pleaded sufficient facts to survive defenses of limitations or laches.

Particularized pleading requirements therefore did not exist to justify to the world why the plaintiff was pursuing a fraud claim, but simply to "enable the defendant

to meet the fraud," and understand "the alleged time of its discovery." *Moore* v. *Greene*, 60 U.S. 69, 70, 72 (1856).

5. This flexible approach in the English and early American cases reflected the law's desire to balance between the need to give notice to a defendant in a fraud case—so he would "know how to prepare his defense"—and the need to avoid unduly burdening the plaintiff. *State v. Johnson*, 1 D. Chip. 129, 130 (Vt. 1797); s*ee St. Louis & S.F. Ry.* v. *Johnston*, 133 U.S. 566, 577 (1890) ("The defendant should not be subjected to being taken by surprise; and enough should be stated to justify the conclusion of law without undue minuteness.").

6. By history's lights, Petitioner's particularity demands appear particularly unsupportable. As particularity requirements are concerned with giving fair notice to defendants, particularity should not demand that plaintiffs aver things that defendants already know—and that plaintiffs often can only guess—including the content of internal documents that may lie within defendants' exclusive possession. At common law, particularity did not require that much. And to the extent that Congress built upon the common law, as Petitioners contend (at 23-26), that understanding should inform how this Court interprets the statute.

B. The history of particularity under Rule 9(b)

1. When the Federal Rules of Civil Procedure merged law and equity in 1938, equity won out. The particularity requirements developed in English and American equity jurisprudence were adopted in what is now Rule 9(b). That rule requires complaints "alleging fraud or mistake" to "state with particularity the circumstances constituting fraud or mistake," while "[m]alice, intent, knowledge, and

other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The PSLRA's particularity requirements come directly from Rule 9(b). H.R. Rep. No. 104-369, at 41(1995) (noting that Congress adopted the PSLRA's pleading standards "to conform the language to Rule 9(b)'s notion of pleading with 'particularity.'").

The notion that Rule 9(b) was meant to impose particularity requirements for complaints alleging fraud or mistake merely because they were "thought to be disfavored' presumably would have been anathema to the drafters of the original Rules." Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. J. 1, 92 (2010). After all, Rule 9(b) includes in the particularity requirement claims based on "mistake," a common failing of all humans. Its joinder with fraud undercuts the claim that the particularity requirement was intended to prevent harm to the defendant's reputation. Moreover, if reputation was the reason for the rule, it is vastly under-inclusive considering all of the charges that can defame an individual or a business.

Rather, Rule 9(b)'s requirements were instead an integral part of the "notice-pleading framework" that the drafters of the federal rules inherited from the common law and sought to adopt with the Federal Rules of Civil Procedure. *See* Adam N. Steinman, *Notice Pleading in Exile*, 41 Cardozo L. Rev. 1057, 1057 (2020). That much is clear from Rule 9(b)'s first sentence, which connects the particularity requirement to the factual "circumstances constituting fraud or mistake"—the real-world facts that would remind the defendant of the precise events in question. By contrast, "[m]alice, intent, knowledge" and similar "conditions of a person's mind" may be alleged generally, since defendants already know the conditions of their

own minds and do not need to be reminded of them. And federal courts have interpreted Rule 9(b)'s particularity requirement to have a similar flexibility to its common-law forebearers—a flexibility that is not compatible with any demand that plaintiffs plead the content of internal company documents to allege scienter.

The Appendix of Forms following the Federal Rules of Civil Procedure casts further light on the meaning of Rule 9(b). Model complaints were issued with the original rules in 1938 "to illustrate the simplicity and brevity of statement which the rules contemplate." Fed. R. Civ. P. 84 (1940). The form complaints were designed to be "sufficient under the rules." *Swierkiewicz* v. *Sorema*, 534 U.S. 506, 513 n.4 (2002). Form 13, designed to satisfy Rule 9(b)'s requirements, alleged simply that the defendant "on or about _____ conveyed all his property, real and personal * * * for the purpose of defrauding plaintiff." Fed. R. Civ. P. 84, Form 13 (1938) (abrogated 2015)[2]; *see* Charles Clark, *Pleading Under the Federal Rules*, 12 Wyo. L. J. 177, 181 (1958) (describing the forms as "the most important part of the rules").

In the decades following the enactment of the Federal Rules, courts interpreted particularity as serving a notice-giving function for defendants. As one court wrote, pleading with particularity did "not mean that a textbook pleading of all the elements of fraud [is] required but requires

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[2] The forms were not abrogated because they were no longer valid, but rather because they were deemed no longer necessary to practitioners who had sufficient models and experience, so the "purpose of providing illustrations for the rules * * * ha[d] been fulfilled." Fed. R. Civ. P. 84 (Advisory Committee's note to the 2015 amendments).

that the complaint set forth the facts with sufficient particularity to apprise the defendant fairly of the charges made against him." *Union Mut. Life Ins. Co.* v. *Simon*, 22 F.R.D. 186, 187 (E.D. Pa. 1958); *see also Carrigan* v. *Cal. State Legis.*, 263 F.2d 560, 565 (9th Cir. 1959) ("When fraud is alleged, it must be particularized as Rule 9(b) requires, but it still must be as short, plain, simple, concise, and direct, as is reasonable under the circumstances, and as Rule 8(a) and 8(e) require.").

Many courts emphasized that the purpose of Rule 9(b) was merely "to require more of a plaintiff who charges a defendant with fraud than merely a statement that 'the defendant fraudulently induced the plaintiff to enter into a contract' or something of that sort." *Simon*, 22 F.R.D. at 187. Nevertheless, "[e]vidence and proof" were not required at the pleading stage, "for that would destroy the fundamental distinction between the ultimate facts, which alone need be pleaded, and the evidence and proof upon which these facts are based." *Hirschhorn* v. *Mine Safety Appliances Co.*, 54 F. Supp. 588, 591 (W.D. Pa. 1944). Courts were unlikely to dismiss a fraud claim for lack of particularity unless the complaint demonstrated "naked use of the term" fraud, "without the conjoint allegation of substantiating details." *Dixie Mercerizing Co.* v. *Triangle Thread Mills, Inc.*, 17 F.R.D. 8, 10 (S.D.N.Y. 1955); *see, e.g.*, *C.I.T. Fin. Corp.* v. *Sachs*, 10 F.R.D. 397, 398 (S.D.N.Y. 1950) (acknowledging that "many details" [of the alleged fraud] are omitted" from the complaint, but concluding that "these matters are more in the nature of evidence").

2. Before the PSLRA, most circuits agreed on a "newspaper story" approach to pleading particularity in securities fraud complaints. *See, e.g.*, *DiLeo* v. *Ernst & Young*,

901 F.2d 624, 627 (7th Cir. 1990) (pleading with particularity means "the who, what, when, where, and how: the first paragraph of any newspaper story"); *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (plaintiff must provide "statements of the time, place and nature of the alleged fraudulent activities" rather than "mere conclusory allegations of fraud"); *Kowal* v. *MCI Commc'ns Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994) (requiring that plaintiffs allege "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud"); *Koch* v. *Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (a complaint alleging fraud must "set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof").

Courts, however, "diverged on the character of the Rule 9(b) inquiry in § 10(b) cases"—dividing along this issue: "Could securities fraud plaintiffs allege the requisite mental state simply by saying that scienter existed, or were they required to allege with particularity facts giving rise to an inference of scienter?" *Tellabs*, 551 U.S. at 319.

Some courts hewed closely to the text and held that Rule 9(b) merely requires proving the circumstances of fraud with particularity, while the defendant's state of mind could be averred generally. The Ninth Circuit, for example, allowed securities-fraud plaintiffs to allege the requisite state of mind "simply by saying that scienter existed." *See, e.g.*, *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1546-1547 (9th Cir. 1994) (en banc).

By contrast, some courts, including the Second Circuit, imposed a more stringent standard, holding that Rule 9(b) required parties to "specifically plead those events" giving

rise to a "strong inference that the defendants had the requisite state of mind." *Ross* v. *A.H. Robins Co.*, 607 F.2d 545, 558 (2d Cir. 1979).

3. Congress enacted the PSLRA in 1995 to address perceived abuses while preserving investors' ability to bring meritorious claims of securities fraud. The legislation reflected a shared recognition that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action" and that such lawsuits "promote public and global confidence in our capital markets and help to deter wrongdoing." H.R. Rep. No. 104-369, at 31 (1995). To strike this balance, the PSLRA codified pleading standards for securities cases. For scienter, the Act requires complaints to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A).

The PSLRA adopted the Second Circuit's more stringent version of Rule 9(b)'s particularity standard. 15 U.S.C. § 78u-4(b)(1). While the PSLRA did not expressly "codify" the Second Circuit's case law developing that standard, *Tellabs*, 551 U.S. at 332, that caselaw nonetheless sheds light on what the standard Congress adopted actually means. And the Second Circuit's formulation is incompatible with the level of particularity that Petitioners would demand.

As the court explained in *Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994), under the Second Circuit's "strong inference" standard, it would plainly be insufficient to merely "couple a factual statement with a conclusory allegation of fraudulent intent." Complaints relying on "conclusory allegations of scienter * * * barren

of any factual basis" were routinely dismissed. *Conn. Nat'l Bank* v. *Fluor Corp.*, 808 F.2d 957, 962 (2d Cir. 1987). A conclusory allegation of scienter is not particularized merely because it is connected to a particularized factual allegation. Yet it would be sufficient, the court held, for a plaintiff to "adduce the kind of circumstantial evidence that would indicate conscious fraudulent behavior or recklessness." *Id.*; *see Novak*, 216 F.3d at 308 (holding that a complaint "typically [] sufficed" if it "specifically alleged defendants' knowledge of facts or access to information contradicting their public statements.").

4. The Second Circuit's decision in *Novak* v. *Kasaks* comprehensively surveyed the circuit's pre-PSLRA jurisprudence and outlined a number of factual scenarios that the court had deemed sufficient in the past to establish a strong inference of scienter from circumstantial evidence. 216 F.3d at 308. And none of these factual scenarios would demand a level of detail that would even approach requiring plaintiffs to delve into the specific contents of a company's internal documents.

For instance, a plaintiff could satisfy the "strong inference" standard for scienter through allegations that "defendants benefitted in some concrete and personal way from the purported fraud"—such as by "profit[ing] from extensive insider sales" *Novak*, 216 F.3d at 307-08 (citing *Stevelman* v. *Alias Research Inc.*, 174 F.3d 79, 85 (2d Cir. 1999); *Goldman* v. *Belden*, 754 F.2d 1059, 1070 (2d Cir. 1985). A plaintiff could also allege facts "that constituted strong circumstantial evidence of conscious misbehavior or recklessness," such as by extensive "securities trading by insiders" who are "privy" to the fraud. *Novak*, 216 F.3d at 308 (citing *Simon DeBartolo Group, L.P.* v. *Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 168-69 (2d Cir. 1999). A

plaintiff could likewise satisfy the "strong inference" standard by averring that the misleading nature of certain statements was so obvious "that the defendant must have been aware of it," *Novak*, 216 F.3d at 308 (quoting *Rolf* v. *Blyth, Eastman Dillon Co., Inc.*, 570 F.2d 38, 47 (2d Cir. 1978)), or by alleging "facts demonstrating that defendants failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud." *Novak*, 216 F. 3d at 308-09.

None of these pleading scenarios would require the plaintiff's complaint to reverse-engineer the entire thought process by which defendants developed an awareness that their statements were false or misleading—much less to describe or quote the content of every document they encountered along their journey to that realization.

Moreover, the Second Circuit in *Novak* made clear that in scenarios in which plaintiffs *did* attempt to satisfy the scienter requirement by averring that defendants possess "knowledge of facts or access to information contradicting their public statements," a "clear inference" of scienter could be established by alleging that "defendants knew" or "should have known that they were misrepresenting material facts." *Novak*, 216 F.3d at 308. Under Second Circuit's pre-PSLRA case law summarized in *Novak*, there was no need to demonstrate that the defendants even read the information contradicting their public statements, much less relate the specific factual content of that information in the complaint. And that makes sense, because such information would not be necessary to give defendants notice of the charges against them.

Accordingly, there is a direct through-line connecting the notice-providing function of common law particularity

standards and the similar standards under the federal rules and the PSLRA. And Petitioners' demand that securities-fraud plaintiffs provide the content of internal company documents deviates significantly from it.

C. *Tellabs*' interpretation of particularity

Petitioners' conception of particularity also cannot be squared with the standards for establishing particularity under the PSLRA set forth in this Court's cases—especially this Court's decision in *Tellabs*. *Tellabs* sets the ground rules for applying the PSLRA's rules for pleading scienter that are incompatible with any bright-line rule that plaintiffs must always come forward with the contents of defendants' internal documents to survive the pleading stage.

1. The Court articulated three principles: *First*, courts must "accept all factual allegations in the complaint as true." *Tellabs*, 551 U.S. at 322. *Second*, courts must consider "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 323. *Third*, a "strong inference" of scienter requires an inference that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id.* at 314. Applying these principles, courts must ask: "When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" *Id.* at 326. And in *Tellabs*, the Court applied these principles to reject a challenge to a securities fraud complaint that is virtually identical to the challenge Petitioners raise here.

Factually, *Tellabs* could not be more on point. The factual backdrop was similar: The underlying claim in *Tellabs* centered on allegations that the CEO of a large company misled shareholders about sales of the company's "flagship networking device," insisting, among other things, that the product was "available for delivery" and demand was "strong and growing," when in fact the product was "not ready for delivery" and "demand was weak." *Tellabs*, 551 U.S. at 315. The issue of scienter was similar too: As in this case, the question of whether the CEO knew his statements were false or misleading turned on whether he kept up with the actual sales numbers for his own company's flagship product. *Ibid.*

The method that the plaintiff in *Tellabs* chose to prove scienter was identical to the method chosen by Respondents in this case: The plaintiff sought to plead the existence of scienter by alleging that the company's CEO either knew or should have known that the company's sales "reports" (which the CEO received regularly) were inconsistent with his public statements. *Ibid.* And the CEO's challenge to those allegations comes right out of Petitioners' playbook. The corporation offered the same bright-line rule Petitioners offer here, arguing that the particularity standard in 15 U.S.C. § 78u-4(b)(2) required plaintiffs to come forward with the contents of these reports that the CEO had allegedly seen, and argued that the plaintiffs' allegations lacked particularity because they failed to allege details like the reports' "precise dates," *id.* at 325, or "what those reports say," Oral Arg. Tr. 14.

But the Court rejected this bright-line rule when it was offered by the petitioner in *Tellabs*, determining it to be incompatible with the ground rules it had just announced for establishing particularity. The Court "reiterate[d]"

that "the court's job is not to scrutinize each allegation in isolation." *Tellabs*, 551 U.S. at 326. A court must instead "review all the allegations holistically," considering "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Ibid.* So any weakness in proving scienter that might result from the failure to come forward with the contents of specific documents might be made up by bolstering scienter through other means—such as by averring the sheer implausibility that senior executives within large companies would not maintain any awareness about sales of their flagship product.

2. Despite what Petitioners suggest, *Tellabs* did not allow their preferred bright-line rule to come in through the back door by holding that "omissions and ambiguities count against inferring scienter." Pet. 24. The very next sentence (which the Petitioners ignore) makes clear that such omissions do not *foreclose* an inference of scienter, *Tellabs*, 551 U.S. at 326, but merely count as data points in the "holistic" inquiry the PSLRA demands.

The proof that *Tellabs* rejects Petitioners' bright-line rule is in the pudding. Since *Tellabs* was decided, the Court has invoked the decision, and the "holistic" inquiry it adopts, to reject numerous bright-line rules that the defense bar has asked the Court to adopt. *See Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 48–49 (2011) (applying *Tellabs* and rejecting defendant's "proposed bright-line rule" for determining whether the complaint creates the necessary "strong inference of scienter"); *cf. Basic Inc.* v. *Levinson*, 485 U.S. 224, 236 (1988) (rejecting a bright-line rule for materiality in favor of a contextual

inquiry looking to the "total mix" of information, and observing that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive"). Clearly, the Court correctly understands *Tellabs* as eschewing *all* categorical bright-line rules for pleading particularity under the PSLRA. And it is critical that Petitioners' demands for more particularized particularity meet the same fate, because demands for bright-line rules to fight supposed "litigation explosions" and "strike suits" are a one-way ratchet. Since one can always demand more particularity, adopting bright-line rules will merely beget demands for more bright-line rules—making pleading standards ever more difficult to satisfy and causing more meritorious claims to fail at the pleading stage. *See* Arthur Miller, "*The Pretrial Rush to Judgment: Are the 'Litigation Explosion,' 'Liability Crisis,' and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*", 78 N.Y.U. L. Rev. 982, 1011-13 (2003).

D. The particularity requirement and averment on information and belief

Finally, Petitioners' demand that the Court interpret the PSLRA's particularity requirement as requiring plaintiffs to plead the content of internal documents is hard to square with the fact that the PSLRA itself—and the federal rules more generally—allow plaintiffs to plead matters "upon information and belief." 15 U.S.C. § 78u-4(b)(1); Fed. R. Civ. P. 8; *cf. id.* 11(b)(3) (allowing plaintiffs to plead on information and belief that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

The "information and belief" standard allows plaintiffs to make allegations concerning matters they may not yet know at the time of pleading—because they have not yet conducted discovery—but that the plaintiff recognizes to be necessary to prove its claim. This standard is incompatible with any bright-line rule that plaintiffs must in every case prove the content of internal company documents they rely upon to prove scienter, because they may not possess those documents before filing suit. And the PSLRA mandates that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss," 15 U.S.C. § 78u-4(b)(3)(B), thus requiring plaintiffs to meet these pleading standards based solely on information they can gather before filing the complaint.

II. Petitioners' contention that the PSLRA prohibits plaintiffs from relying on expert analysis to allege falsity also conflicts with centuries of particularized pleading standards.

It is also hard to square the other bright-line rule for pleading particularity that Petitioners offer in this case—that plaintiffs can never support averments made "on information and belief" with expert analysis—with pleading standards that have persisted since the common law or simple common sense.

Under the PSLRA, if a plaintiff makes an allegation of falsity "on information and belief," the complaint must "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Nothing in that rule prohibits the "facts" used to bolster such belief-based allegations from being developed through expert analysis. And indeed, if the plaintiff supports the factual allegations upon which its belief is based with expert analysis, so much the better—including such analysis can only bolster

the conclusion that the matters pleaded on information and belief are the true facts. And such analysis adds further detail to the facts upon which those beliefs are stated, thereby seemingly increasing, rather than decreasing, the level of particularity in the complaint. So expert analysis can add a great deal to a securities-fraud complaint. It does not detract.

The idea that the particularity requirement in § 78u-4(b)(1) can only be satisfied through matters that are personally known to the plaintiff, rather than analysis from outside experts, violates a rule for pleading particularity that has persisted since common law. Pleading particularity has only to do with the factual matters necessary to support the plaintiff's allegations—not the evidence that will eventually support it.

Under the standards for pleading particularity that have existed since common law, "the general statement of a precise fact [was] often sufficient," and circumstances that would "confirm or establish" that statement of fact were "matters of evidence," not allegation. Story, *Commentaries on Equity Pleadings* § 252 (1838). This Court has maintained the distinction between "an evidentiary standard" and a "pleading requirement" ever since. *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 510 (2002). Accordingly, the "[f]actual matter" necessary to support a belief-based allegation of falsity may come from a range of sources: newspaper and academic articles, government reports, independent analysis, or even plaintiffs' own calculations. The PSLRA asks only whether these sources sufficiently bolster the plaintiffs' belief-based pleading to allow the claim to continue. And answering that question turns only on the level of detail with which the bolstering facts are stated—and whether the inferences the plaintiff

makes from the factual detail are reasonable. So the only question to be asked in determining whether expert analysis bolsters a belief-based pleading is whether the analysis leads to sufficiently particular factual conclusions to support an allegation of falsity—not the source. To hold otherwise would completely undermine the wall of separation between pleading allegations and proving evidence that has existed since common law.

That centuries-old barrier would only be further undermined by the suggestion made by some on the other side that *Daubert*-like standards and the Federal Rules of Evidence should be used to test the reliability of expert analysis in a complaint. *See, e.g.*, Br. Atlantic Legal Found. at 7-8. Such tests have never been part of the pleading analysis, and for good reason: it would completely eviscerate the distinction between matters of pleading and those of evidence.

The Federal Rules of Evidence are restricted to "govern[ing] the treatment of evidentiary questions in federal courts"—not matters of pleading. *Bourjaily* v. *United States*, 483 U.S. 171, 177 (1987). And Federal Rule 702, as well as the standards the Court adopted in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) are designed to test the evidence that goes to the jury, to ensure that "it will help the trier of fact to understand the evidence or to determine a fact in issue." These standards play absolutely no role in determining the matters that parties may include in their pleadings and whether courts can consider them in evaluating the sufficiency of the complaint. Indeed, even under the PSLRA's particularity standards, the Court has never required that plaintiffs plead evidence or prove their case at the outset—and has

rejected calls to impose such requirements at the pleadings stage. *See Tellabs*, 551 U.S. at 324 n.5 (rejecting Justice Alito's proposal to "transpose to the pleading stage 'the test that is used at the summary-judgment and judgment-as-a-matter-of-law stages.'"). In *Matrixx*, for instance, the Court found a strong inference of scienter but noted that "[w]hether respondents can ultimately prove their allegations * * * is an altogether different question." *Matrixx*, 563 U.S. at 49. Moving the "battle of the experts" to the outset of litigation would erect a new barrier for plaintiffs without any textual grounding in the PSLRA or the Court's precedent. And for that reason, the Court should refuse to adopt the additional bright-line rules offered by Petitioners and their amici here.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

Jeremy A. Lieberman
Emma Gilmore
POMERANTZ LLP
600 3rd Ave.
New York, New York 10016

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com

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