No. 23-970

In the Supreme Court of the United States

NVIDIA CORPORATION 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 BRIAN T. FITZPATRICK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

BRIAN T. FITZPATRICK
VANDERBILT LAW SCHOOL
131 21ST AVENUE SOUTH
NASHVILLE, TN 37203
(212) 789-1340
BRIAN.FITZPATRICK@
VANDERBILT.EDU

JAVIER BLEICHMAR
Counsel of Record
JOSEPH A. FONTI
BLEICHMAR FONTI &
AULD LLP
300 Park Avenue
New York, NY 10022
(212) 789-1340
JBLEICHMAR@BFALAW.COM
JFONTI@BFALAW.COM

Counsel for Amicus Curiae

October 2, 2024

TABLE OF CONTENTS

Table of authorities ii

Interest of amicus curiae 1

Introduction and summary of argument 1

Argument 3

I. A brief history of pleading. 3

II. The PSLRA's terms were well-known legal terms of art. 7

A. "On information and belief" 7

B. "With particularity" 8

III. The questions presented are easily answered by textualism. 9

A. The PSLRA does not require plaintiffs to possess internal company documents before filing. 9

B. The PSLRA does not foreclose pleading facts about expert analyses. 14

IV. Policy considerations counsel in favor of lower pleading burdens, not higher ones. 17

Conclusion 20

TABLE OF AUTHORITIES

Cases

Acito v. IMERCA Group, Inc.,
47 F.3d 47 (2d Cir. 1995) 12

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 4, 5

Goodman v. President & Trustees of Bowdoin College,
135 F. Supp. 2d 40 (D. Me. 2001) 4

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 18

In re Time Warner Inc. Securities Litigation,
9 F.3d 259 (2d Cir. 1993) 12

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 7, 17

Ross v. A.H. Robins Co., Inc.,
607 F.2d 545 (2d. Cir. 1979) 5, 14

Sherwood v. Sutton,
21 F.Cas. 1303 (No. 12,782) (C.C.D.N.H. 1828) 4

Shields v. Citytrust Bancorp, Inc.,
25 F.3d 1124 (2d Cir. 1994) 12

State v. Johnson,
1 D. Chip. 129 (Vt. 1797) 4

Stearns v. Page,
48 U.S. 819 (1849) 4

Swierkiewicz v. Sorema, N.A.,
534 U.S. 506 (2002) 4

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 1, 12, 14

Statutes and Rules

15 U.S.C. § 78u-4(b) 5, 6, 8, 15

Federal Rule of Civil Procedure 84 9

Legislative Materials

H.R. Report No. 104-369 (1995) 13

Private Securities Litigation Reform Act,
H.R. 1058, 104th Congress § 104(b)
(June 28, 1995) 12

Other Authorities

5 Charles A. Wright & Arthur R. Miller,
Federal Practice & Procedure
(2d ed. 1990) 8, 9, 10, 15

Alexander Dyck et al.,
How Pervasive is Corporate Fraud?, 29 Rev.
Accounting Stud. 736 (2024) 19

Am. Jud. Soc. R. Civ. P. Bull. 14 (1919) 4

Amy Coney Barrett,
Congressional Insiders and Outsiders,
84 U. Chi. L. Rev. 2193 (2017) 7

Antonin Scalia & Bryan Garner,
Reading Law (2012) 10

Brian Fitzpatrick,
Twombly *and* Iqbal *Reconsidered*, 87 Notre Dame L.
Rev. 1621 (2012) 3

Brian T. Fitzpatrick,
An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. Empirical L. Stud. 811 (2010) .. 1

Brian T. Fitzpatrick,
The Conservative Case for Class Actions (2019) 1, 18, 19, 20

Charles E. Clark,
Code Pleading § 48 (1st ed. 1928) 4, 8

Christopher Fairman,
The Myth of Notice Pleading, 45 Ariz. L. Rev. 987 (2003) 4

Christopher Fairman,
Heightened Pleading, 81 Tex. L. Rev. 551 (2002) 4

Dain C. Donelson et al.,
The Role of Directors' and Officers' Insurance in Securities Fraud Class Action Settlements, 58 J. L. & Econ. 747 (2015) 19

Fred Ramsey & Daniel Schafer,
The Statistical Sleuth (2d ed. 2002) 17

Tara Grove,
Testing Textualism's "Ordinary Meaning," 90 Geo. Wash. L. Rev. 1053 (2022) 7

INTEREST OF AMICUS CURIAE

Brian T. Fitzpatrick is the Milton R. Underwood Chair in Free Enterprise at the Vanderbilt Law School, where, for almost two decades, he has taught the Civil Procedure, Complex Litigation, and Federal Courts courses. He is a well-known expert on class action litigation and has authored some of the most extensive and well-cited empirical studies of class actions, including securities fraud class actions. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010). He has also written an award-winning book on the merits of private enforcement of the law, including the securities laws. *See* Brian T. Fitzpatrick, *The Conservative Case for Class Actions* (2019). But, perhaps most important of all, he is a former law clerk to Justice Scalia and he has dedicated much of his teaching and writing—including this amicus brief—to carrying forward the Justice's legacy of bringing textualism and originalism to American law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court got off on the wrong foot with the Private Securities Litigation Reform Act ("PSLRA"). In its first opinion interpreting the statute, *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308 (2007), the Court, in an opinion by Justice Ginsburg, declared that, because Congress did not define the term "strong inference" in the statute, the Court was left to "prescribe a workable construction . . . geared to the PSLRA's twin goals: to curb frivolous lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." *Id.* at 321-22 ("'Congress did not ... throw much light on what facts ... suffice to create [a strong] inference'"). Neither

Justice Scalia nor Justice Alito joined Justice Ginsburg's opinion, and for good reason: when Congress does not define a term in a statute, the answer is not for judges to go off on their own and try to strike the best balance of what they think the policies at stake are. The answer is to ask what the meaning of the term would have been to a reader at the time the statute was enacted.

Thankfully, it is not necessary to revisit *Tellabs* to resolve the questions presented here because both questions can be answered by reference to other key terms in the PSLRA: "on information and belief" and "with particularity." These were legal terms of art with well-known meanings when the PSLRA was enacted in 1995. Following those meanings easily answers the questions presented in favor of respondents. Textualism makes this case very straightforward.

With respect, *Tellabs* is another story. The term "strong inference" in the PSLRA was also a well-known legal term of art, but Justice Ginsburg eschewed its well-known meaning for the worst of all reasons: because she thought the legislative history told her to do so. If the Court goes down the *Tellabs* path, it should correct this mistake. But whether it corrects the mistake or not, respondents' complaint pleads a "strong inference" of scienter: even under Justice Ginsburg's at-least-as-likely-as-any-other-inference test, it is hard to see how a CEO could remain unaware of what his company's crypto data said before taking the crypto questions that he knew he would be asked every quarter.

Petitioners and their amici argue that, if the Court doesn't throw out complaints like this one that were preceded by extensive investigation, supported by internal whistleblowers, and confirmed by the federal

government's own inquiry, publicly-traded companies will be brought to their knees by meritless cases. These are policy arguments that should be rejected out of hand. But, if they are entertained, the Court should at least hear the rest of the story: the best data we have suggests that the pleading threshold is already too high, not too low. In particular, while only a small fraction of securities fraud lawsuits are meritless, *at least two thirds* of all securities fraud currently goes unremedied. If even strong complaints like this one become foreclosed, it is hard to see what will be left of private enforcement of the securities laws. This will leave us dependent even more than we are now on the government alone to do it for us. That is not a recipe for success. Our securities markets are stronger than those in other developed economies precisely because we do not place all our eggs in the government's basket. Private enforcement is what makes us different and what makes us better. The Court should not choke it off as cavalierly as petitioners and their amici urge.

ARGUMENT

I. A brief history of pleading.

For most of the period under the Federal Rules of Civil Procedure, pleading was supposed to be only about specificity: for most allegations, plaintiffs had to plead with enough specificity to notify the defendant of what the suit was about so the defendant could prepare its answer and discovery requests. For the "circumstances" of fraud, plaintiffs had to plead with a bit more specificity: "with particularity." *See* Brian T. Fitzpatrick, Twombly *and* Iqbal *Reconsidered*, 87 Notre Dame L. Rev. 1621, 1623-29 (2012). There are various theories as to why fraud has always been different—it requires more notice to prepare

a defense, *State v. Johnson*, 1 D. Chip. 129, 130 (Vt. 1797); defendants need protection from reputational harm, *see* Charles E. Clark, *Code Pleading* § 48, at 214 n.87 (1st ed. 1928) (citing Am. Jud. Soc. R. Civ. P. Bull. 14 (1919) art. 15, § 18); tensions between courts of equity and courts of law, *see Stearns v. Page*, 48 U.S. 819, 829 (1849); the longer statute of limitations for fraud claims, *see Sherwood v. Sutton*, 21 F.Cas. 1303 (No. 12,782) (C.C.D.N.H. 1828) (Story, J.)—but, whatever the original motivation, pleading under the Rules was supposed to be about specificity; the credibility of allegations was supposed to be irrelevant. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002) ("[R]ule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."); *Goodman v. President & Trs. of Bowdoin Coll.*, 135 F. Supp. 2d 40, 59 (D. Me. 2001) ("Plaintiff has pleaded . . . sufficiently to put Defendants on notice of the alleged actions . . . Although the Court has serious concerns about the merits of Plaintiff's assertion of fraudulent conduct . . . the Court cannot conclude that it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . . ." (internal quotation marks omitted)).

This Court stuck to that view until its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Court held that allegations not only have to be specific enough; they also have to be credible enough—they have to be "plausible." *Id.* at 556. Although that view was new to the Court, the truth is that lower courts had been injecting credibility thresholds into pleading long before *Twombly*. *See e.g.*, Christopher Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987 (2003); Christopher Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551 (2002). One of those lower courts was the Second

Circuit. For the exact same reasons the Court in *Twombly* eventually did it—discovery had become too expensive to let anyone get it who wanted access, *see Twombly*, 550 U.S. at 558 ("lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value" (internal quotation marks omitted))—the Second Circuit decided that allegations of fraudulent intent in securities fraud cases had to be credible, but it picked a different word than *Twombly*: it said the allegations had to be "strong"; i.e., they had to raise a "strong inference" that the fraudulent intent had in fact existed. *Ross v. A.H. Robins Co., Inc.*, 607 F.2d 545, 557-58 (2d. Cir. 1979) ("In the context of securities litigation Rule 9(b) serves an additional purpose[:] to diminish the possibility that a plaintiff with a largely groundless claim [will] take up the time of a number of other people . . ., with the right to do so representing an in terrorem increment of the settlement value . . . ." (internal quotation marks omitted)). Congress codified this credibility requirement in the PSLRA. *See* 15 U.S.C. § 78u-4(b)(2)(A) ("[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."). This is the "scienter" section of the PSLRA.

The PSLRA also had something to say about specificity. Rule 9(b) requires that the "circumstances" of fraud be pled "with particularity" and, in the PSLRA, Congress detailed circumstances of a securities fraud claim that it wanted so pled: "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if

an allegation regarding the statement . . . is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id.* § 78u-4(b)(1). This is the "falsity" section of the PSLRA. Thus, the pleading requirements for the allegations at issue here look like this:

	Specificity	Credibility
Falsity	With particularity, including: Each misleading statement + Why each statement is misleading + All facts comprising the basis for allegations made on information and belief	Plausible[1]
Scienter	With particularity	Strong

[1] There is an argument that there should be no credibility requirement at all for falsity allegations because, unlike for scienter, the PSLRA does not set forth a credibility requirement for falsity, and, at the time the PSLRA was enacted, this Court had not decided *Twombly* and had not imposed a credibility requirement under the Rules. Thus, to the extent the PSLRA displaced the Federal Rules in 1995, subsequent interpretations under the Rules might not retroactively "codify themselves" into the statute. Nonetheless, this

II. The PSLRA's terms were well-known legal terms of art.

Textualists agree that statutes should be read as a reader would read them at the time the statute was enacted. But there is a debate over who the reader should be. Some say it should be a layperson; others say it should be a lawyer. *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2202 (2017) ("It is not clear to me that textualists must pick a single perspective applicable across all statutes. Sometimes the relevant reader may be a layperson, and sometimes she may be a lawyer."). Some say it should be a hypothetical, "reasonable" reader; others say it should be a real-life, "empirical" reader. *See, e.g.*, Tara Grove, *Testing Textualism's "Ordinary Meaning,"* 90 Geo. Wash. L. Rev. 1053 (2022). These are heady debates, but it is not necessary to resolve them to answer the questions presented here. All roads here lead to lawyers. The sections of the PSLRA at issue here are about pleading and pleading is the work of lawyers. Although there may be terms in the PSLRA on which a hypothetical, "reasonable" lawyer and a real-life, "empirical" lawyer might diverge, *see* n.2, *infra*, any divergence does not matter with respect to the questions presented here. Either way, respondents win.

A. "On information and belief"

The Federal Rules—both Rules 8 and 9—have long permitted plaintiffs to plead allegations "on information

---

Court said otherwise in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011), and, because nothing in the questions presented turns on it, *see* n.4, *infra*, there is no harm in assuming that the *Twombly* credibility requirement carries over to the falsity allegations.

and belief." *See* 5 Wright & Miller's *Fed. Prac. & Proc.* §§ 1224, 1298 (2d ed. 1990). Not only did the PSLRA not eliminate this, it explicitly acknowledged it. *See* 15 U.S.C. § 78u-4(b)(1). This phrase would have been well known to any lawyer in the United States in 1995. It meant then (as it still means today) that the matters pleaded "are not within the knowledge of the plaintiff but he has sufficient data to justify interposing an allegation on the subject." 5 Wright & Miller, *supra*, at § 1224. This means that plaintiffs do not need to know for sure that the statements they are alleging are false are, in fact, false; they just need an educated surmise—"sufficient data"—that they are false.

B. "With particularity"

Rule 9(b) has required the circumstances of fraud to be pled "with particularity" for almost 100 years and the phrase was in use even before that. *See* Clark, *Code Pleading* § 48, at 214 n.87. Again, not only did the PSLRA not change this, it codified it. *See* 15 U.S.C. § 78u-4(b)(1), (2)(A). The phrase "with particularity" would therefore have been equally well known in 1995. Although the phrase had been given various formulations, the upshot was that fraud had to be pled only "with [enough] precision" to apprise the defendant of "the acts relied upon as constituting the fraud charged." 5 Wright & Miller, *supra*, § 1297; *see also id.* § 1298 ("[T]he most basic consideration in making a judgment as to the sufficiency of a pleading [under Rule 9(b)] is . . . how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading."). Lest there be any doubt about how little precision that entailed, in 1995, the Rules still had the Appendix of Forms attached. The Forms were "sufficient" under the Rules. *See* Fed. R.

Civ. P. 84 (abrogated 2015). Form 13, for a fraudulent conveyance, was very short: "Defendant C.D. on or about ___ conveyed all his property, real and personal to defendant E.F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidence by the note above referred to." 5 Wright & Miller, *supra*, § 1297 (internal quotation marks omitted); *see also* Resp. Br. at 15a. A reasonable lawyer in America would have understood "with particularity" to require only this in 1995.[2]

III. The Questions Presented are easily answered by textualism.

A. The PSLRA does not require plaintiffs to possess internal company documents before filing.

The first question presented asks whether the PSLRA requires plaintiffs to plead with particularity the "contents" of internal company documents when scienter is based on the defendant's contemporaneous knowledge of those documents. Respondents say they have already done this, but petitioners disagree. *Compare* Resp. Br. 41-42 *with* Pet'r Br. 33. If petitioners are right, it would all but require plaintiffs to possess internal company documents before they filed suit. The complaint here

---

[2] This is one question on which the reasonable lawyer and the real-life lawyer might diverge: the reasonable lawyer would have read the Rules to mean what they say and embraced the Forms; the real-life lawyer would have known that many did not abide the Forms by 1995; as I noted above, pleading practices in the lower courts had heightened by then. *See also* 5 Wright & Miller, *supra*, § 1297 ("In recent years some courts have shown a tendency to be more demanding in their application of Rule 9(b).") Nonetheless, as I explain, any such difference does not matter to the questions presented because this complaint has elaborate detail.

already relies on company insiders who actually saw some of the internal documents. If that is not good enough, then the only other way besides already possessing those documents that I can see satisfying petitioners would be to find company insiders with a photographic memory. Not only does the PSLRA not require this, but the PSLRA explicitly does *not* require it. As I recounted, the falsity section of the PSLRA permits plaintiffs to plead "on information and belief." The well-understood meaning of this term was that you do not need to know for certain that what you are alleging is true; you can make an educated surmise. Obviously, if you already had the internal company documents, you would not need to make an educated surmise that the internal documents were different from what the defendant stated publicly; you could simply allege what the internal documents said and move on. *See* 5 Wright & Miller, *supra*, § 1298 ("For instance, . . . complaining stockholders . . . usually have little information about the manner in which the corporation's internal affairs are conducted and rarely are able to provide details as to the alleged fraud. Yet courts have been understandably reluctant to terminate these actions . . . ."). In other words, to read the PSLRA's section on scienter in the way petitioners want to read it would then *read out* of the PSLRA's section on falsity the words "on information and belief." But that's not how we should read statutes; we should read neighboring sections of a statute to be consistent, not at odds. *See* Antonin Scalia & Bryan Garner, *Reading Law* 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

It is true that the words "on information and belief" do not appear in the PSLRA's section on scienter. But the scienter section is about falsity; it is about scienter *as to*

falsity. The two sections are obviously connected, and, as I noted, reading the scienter section any other way would contradict the falsity section, and that is something we should not do. Moreover, the PSLRA did not displace *all* of the Federal Rules of Civil Procedure for securities fraud claims; as I recounted, it only added a credibility requirement for scienter allegations and detailed circumstances it wanted pled with particularity. It did not say that "on information and belief" pleading was otherwise barred. Nor could it have. Unless at the time you file suit you have a taped confession from a corporate executive saying "Yes, I knew the numbers were fake!," how else could you plead scienter but on information and belief? This is why the scienter section of the PSLRA uses the word "inference"; it explicitly acknowledges that allegations of scienter will have to be pled circumstantially.

It is important to note that not a single word of this analysis requires the Court to revisit *Tellabs* in order to rule for respondents. But if the Court does wish to revisit that case, it should correct its atextualist reading of "strong inference." The term "strong inference" was admittedly less well known in 1995 than the other key terms in the PSLRA; most lawyers may not have known what it meant off the top of their heads. But any *securities fraud* lawyer would have known it off the top of his head—and any other lawyer would have known where to look to find it. As I noted above, everyone agrees the term was lifted from the Second Circuit. Thus, any lawyer would have known to do exactly what I did here to understand what it meant: look to what the Second Circuit said it meant. And what did the Second Circuit say it meant? It said "strong inference" meant either "facts establishing a motive to commit fraud and an opportunity to do so" or

"facts constituting circumstantial evidence of either reckless or conscious behavior." *E.g., In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268-69 (2d Cir. 1993); *Acito v. IMERCA Grp.*, 47 F.3d 47, 52 (2d Cir. 1995); *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). This, then, is what "strong inference" should mean in the PSLRA, too.

In *Tellabs*, Justice Ginsburg didn't look for the Second Circuit's definition of "strong inference." She looked instead to the lay dictionary*, see* 551 U.S. at 323 (and, even then, only in passing; as I noted, the focus of her opinion was on a policy balance). This was a mistake two times over. First, as I noted above, the relevant reader is a lawyer not a layperson; a lawyer would not look in a lay dictionary to understand the meaning of a legal term of art; a lawyer would look to the Second Circuit for a legal term of art coined in the Second Circuit. Second, and even worse, the reason she didn't look to the Second Circuit was because she worried the legislative history of the PSLRA may have told her not to. *See id.* at 322 ("While adopting the Second Circuit's 'strong inference' standard, Congress did not codify that Circuit's case law interpreting the standard."). In particular, the bill that passed the Senate explicitly defined "strong inference" in the exact Second Circuit language I quoted above. *See* Private Securities Litigation Reform Act, H.R. 1058, 104th Cong. § 104(b) (as passed by Senate, June 28, 1995) ("[A] strong inference . . . may be established either . . . (A) by alleging facts to show that the defendant had both motive and opportunity to commit fraud; or (B) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant."). The Conference Committee stripped out this language because there was apparently a difference of opinion over whether to

"codify" the Second Circuit's case law. *See* H.R. Rep. No. 104-369, at 41 & n.23 (1995) (Conf. Rep.) ("[T]he Conference Committee . . . does not intend to codify the Second Circuit's case law interpreting this pleading standard," and, "[f]or this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness."). But, as we all know by now, the Conference Committee could speak only for its own members; it could not speak for the *hundreds* of other members of Congress whose votes were needed to pass the PSLRA. The terms of the PSLRA do not mean what tea leaves from the Conference Committee's report imply they mean; the terms mean what a lawyer would have understood them to mean by reading them in 1995. What a lawyer would have understood in 1995 is that "strong inference" in the PSLRA meant the same thing it meant in the place it came from: the Second Circuit.

If this mistake is corrected, it still means that respondents win. As I recounted, the Second Circuit said "strong inference" meant "facts establishing a motive to commit fraud and an opportunity to do so" or "facts constituting circumstantial evidence of either reckless or conscious behavior." This definition explicitly permits "circumstantial" evidence. If you already had internal company documents, you would not need to plead circumstantially that the defendant knew what it said was false; you could plead it directly. This is why I could not find a single case in the 16-year pre-PSLRA history of the Second Circuit's "strong inference" jurisprudence that said plaintiffs needed to plead with particularity the contents of internal company documents in their complaints. To the contrary, the very case that created the "strong inference" test suggested precisely the opposite:

"[A]t this stage of the litigation, we cannot realistically expect plaintiffs to be able to plead defendants' actual knowledge." *Ross*, 607 F.2d at 558.

In any event, even if Justice Ginsburg's atextualist reading of "strong inference" is not corrected, it is still hard to see how respondents lose under *Tellabs*. She said "strong inference" meant that the defendant's fraudulent intent must be at least as likely as competing inferences. *See Tellabs*, 551 U.S. at 328 ("A plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an interference of scienter at least as likely as any plausible opposing inference."). But isn't it pretty obvious that the CEO of a company would be made aware of the crypto revenue numbers for his company's flagship product before he spoke to shareholders and analysts every quarter about those very numbers? Isn't the only opposing inference that he recklessly blinded himself to such information, which is equally unlawful?[3]

B. The PSLRA does not foreclose pleading facts about expert analyses.

The second question presented asks whether the PSLRA permits plaintiffs to rely on expert analyses when pleading falsity. As I noted above, the PSLRA explicitly does not require plaintiffs to possess internal company documents at the time they file suit. They are allowed to plead "on information and belief"—i.e., make an educated surmise—that the defendant's public statements were at odds with what was said internally. But the PSLRA says that, when you do that, you must "state with particularity all facts on which that belief is formed"; that is, you must

[3] This Court has assumed that even a reckless state of mind constitutes scienter. *See Tellabs*, 551 U.S. at 319 n.3.

state with particularity the facts on which your educated surmise is based. This prescription was not invented by Congress; it was well known under the Rule 9(b) jurisprudence. *See* 5 Wright & Miller, *supra*, § 1298 ("Allegations based on information and belief usually do not satisfy the particularity requirement, unless accompanied by a statement of the facts upon which the belief is founded."). And the respondents followed it to a tee: they pled "on information and belief," *see* JA2, and then stated that their beliefs were based on, among other things, 1) testimony from company insiders ("FE1," "FE2," "FE3," "FE4," "FE5"), 2) an investment bank ("RBC Capital") that reverse engineered Nvidia's internal sales metrics from subsequent public disclosures, and, to make triply sure that there was some there there, 3) a *second* reverse-engineered analysis from an economic consultant ("Prysm") that respondents retained. The complaint is unusually long and unusually detailed about all three of these sources. There is no doubt these details are "precise" enough to satisfy either a reasonable-lawyer or a real-life-lawyer's understanding of what "with particularity" meant in 1995.

Nonetheless, petitioners and their amici argue that the third source, the *second* reverse-engineered revenue analysis, must be ignored under the PSLRA because expert analyses are "opinions," not "facts." *See* Pet'r Br. 41-44; Grundfest Br. 20-22. But petitioners and their amici have confused the *basis* of a belief with the belief *itself*. When you plead "on information and belief," the PSLRA requires you only to plead facts about the *basis* for your belief. *See* 15 U.S. § 78u-4(b)(1) ("[T]he complaint shall state with particularity all *facts on which that belief is formed*." (emphasis added)). One basis for respondents' belief that the internal numbers were different than what

petitioners let on was the Prysm report. The complaint alleges copious *facts* about *that report*. For example, the fact that the report was done is a fact. *See* JA73. The fact that it was done by Prysm is a fact. *See id.* The fact that it was done by two PhDs in New York and Los Angeles is a fact. *See id.* The fact that it was done by creating a demand-side model of the company's crypto-related sales between May 2017 and July 2018 is a fact. *See* JA74. The fact that the model inputted quarter-over-quarter changes in the top three cryptocurrency networks' computational power needs ("hashrates") is a fact. *See* JA74-75. The fact that the model inputted Nvidia's suggested retail prices is a fact. *See* JA77. The fact that the model inputted various different estimates of Nvidia's market share is a fact. *See* JA78-81. The fact that the model outputted crypto-related sales several times what the company let on is a fact. *See* JA82-83. And the fact that all this was relied upon by the respondents to form their beliefs is a fact. *See* JA2, 14-16. *Those* are the facts that the PSLRA requires be pled for falsity allegations based "on information and belief."[4]

It is true that the conclusions of Prysm's reverse engineering, *see* JA82-83, are only educated surmises about what the company's revenue metrics showed at various points in time. You might say these educated

---

[4] As I noted, *see* n. 1, *supra*, although the PSLRA does not say it, there is an argument that the falsity allegations need not only be specific enough, but that they need to be "plausible" as well. If Prysm's reverse-engineered forensic accounting was the only thing the complaint relied upon and it was really, really badly done, then it is possible that the allegations would not be plausible. But Prysm's analysis was only one of many bases for respondents' belief that petitioners' statements were not true and the other bases are beyond the questions presented.

surmises are "opinions." But you might also say that the fact that the model outputted them and the fact that respondents relied on them are both "facts." The PSLRA tells us which way of talking about Prysm's report is correct: it tell us that you can rely on educated surmises when it says that you can plead falsity "on information and belief." All the PSLRA asks is that, if you do rely on such information, you tell the defendant where the educated surmises came from with particularity. The respondents did that here, in spades.

On this point, it is worth nothing that there is no difference between respondents' forensic accounting analysis and any other empirical study authored by a scientist. When scientists perform regression analyses and other statistical tests, they report *estimates*: they report a mean *and* a margin of error. *See, e.g.*, Fred Ramsey & Daniel Schafer, *The Statistical Sleuth* 181 (2d ed. 2002) ("The method of least squares is one of many procedures for choosing *estimates* of parameters in a statistical model." (emphasis added)). In other words, they report an educated surmise. Yet, every single day, in federal courts all across the United States, plaintiffs plead allegations from such scientific studies in their complaints—including, yes, in PSLRA cases. *See, e.g., Matrixx*, 563 U.S. at 46 n.13 ("[T]he complaint references several studies . . . . [T]he existence of the studies suggests a plausible biological link between zinc and anosmia, which, in combination with the other allegations, is sufficient to survive a motion to dismiss.").

IV. Policy considerations counsel in favor of lower pleading burdens, not higher ones.

Petitioners and their amici urge this Court to answer the questions presented otherwise for policy reasons. *See*,

e.g., Pet'r Br. 4 ("[T]he Ninth Circuit's opinion declares it open season . . . ."); Grundfest Br. 16-18 ("Federal Class Action Securities Fraud Litigation is Vexatious, Common, and Expensive"); Wash. Legal Found. Br. 19-24 ("Affirming the Ninth Circuit's Decision Would Exacerbate The Significant Social Costs Inflicted By Abusive Securities Litigation."). I do not think these policy arguments should be entertained—"[t]hese concerns are more appropriately addressed to Congress," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014); as I explained, textualism resolves this case very easily without them—but, if they are entertained, I wish to give the Court a more complete picture of the state of securities litigation than petitioners and their amici put forward.

In *Tellabs*, Justice Ginsburg tried to balance two competing policies she thought undergirded the PSLRA: discouraging meritless suits and encouraging meritorious suits. How is the PSLRA doing on each side of this equation?

Petitioners and their amici focus on the first side of the equation. But are we really awash in meritless securities fraud cases? I don't think so. It is admittedly a difficult question to study—there is no universal definition of "meritless"—but I examined every single study I could locate on the question for my book, *The Conservative Case for Class Actions*. What did I find? Not very many meritless cases. Some of the studies looked at motion to dismiss rates, *see id.* at 75 & n.7; others looked at nuisance-level settlement prices, *see id.* at 76 & nn.14-15; others looked at factors correlated with meritoriousness, such as government pursuit of the same misconduct, *see id.* at 78 & n.24. But, no matter how you defined it, the

bottom line was the same: only a small minority of securities fraud class actions are meritless. *See id.* at 75-78.

This in contrast to what we know about the other side of the equation—something petitioners and their amici curiously say nothing about: how much unremedied corporate fraud is there? This, too, has been studied, and it, too, is difficult to study, but the studies that have been done have all found the same thing: *the vast majority* of corporate fraud is never remedied. *See* Alexander Dyck et al., *How Pervasive is Corporate Fraud?*, 29 Rev. Accounting Stud. 736, 761-65 (2024) (finding that, "during an average year over the business cycle, 10% of large corporations are committing a misrepresentation . . . that can lead to an alleged securities fraud claim settled for at least $3 million," yet "two out of three corporate frauds go undetected"—and this is "at the low end of the pervasiveness of corporate fraud found in the literature").

If we add the two halves of the equation together, we see that the current pleading standard under the PSLRA is too high, not too low: while few filed cases are meritless, many meritorious cases are neither successful nor even filed. The complaint here is a case in point. It has more indicia of meritoriousness than many if not most securities fraud class actions. There are whistleblowers from inside the company. There are *two* reverse-engineered analyses of the company's financial statements. There was even a government investigation that found wrongdoing, too, *see* Resp. Br. 21-22—one of the most significant indica of merit of a securities fraud lawsuit used in the literature, *see* Dain C. Donelson et al., *The Role of Directors' and Officers' Insurance in Securities Fraud Class Action Settlements*, 58 J. L. & Econ. 747, 751 (2015) ("While it is

impossible to precisely measure a case's merits, these studies use proxies such as restatements, SEC investigations, accounting violations, and insider trading. . . ."). Yet, petitioners and their amici say all this is still not good enough. But if this complaint is not good enough, there won't be many complaints that are.

True, petitioners and their amici wouldn't leave us with securities markets where fraud goes entirely unremedied; the government will still be around. But the government is a far inferior substitute for private enforcement of the law—which is exactly why petitioners and their multi-billion-dollar corporate amici like it. I wrote an entire book on this subject, *see* Fitzpatrick, *supra*, and I won't repeat here all of what I said there. Yet, suffice it to say, both the data and the theory show that the incentives, the resources, and the private bar's inability to become captured by wrongdoers makes private enforcement much more effective than putting all of our eggs in the government's basket. *See id.* at 33-47. Indeed, private enforcement of the law is one of the things that makes the United States different—and better—than the other developed economies around the world. They rely on government to do everything for them. We don't—and our markets are more nimble, innovative, and honest because of it. *See id.* at 25-28, 47. We get a bad rap for our litigiousness in this country. But it is merely the worst way to police the marketplace—except for all the others.

CONCLUSION

Textualism answers the questions presented here very easily. The PSLRA's explicit embrace of "on information and belief" pleading means you don't need to possess internal company documents before filing suit and you can instead rely on circumstantial evidence such as

expert analyses. There is no need to say more here than that. But, if this Court wishes to reengage with *Tellabs*, it should correct Justice Ginsburg's atextualist error. Even if it doesn't, respondents should win under the at-least-as-likely-as-any-other-inference test, and, even more so, in a battle of policy arguments.

Respectfully submitted,

BRIAN T. FITZPATRICK
VANDERBILT LAW SCHOOL
131 21ST AVENUE SOUTH
NASHVILLE, TN 37203
(212) 789-1340
BRIAN.FITZPATRICK@
VANDERBILT.EDU

JAVIER BLEICHMAR
Counsel of Record
JOSEPH A. FONTI
BLEICHMAR FONTI &
AULD LLP
300 Park Avenue
New York, NY 10022
(212) 789-1340
jbleichmar@bfalaw.com
jfonti@bfalaw.com

Counsel for Amicus Curiae

October 2, 2024