No. 23-970

IN THE

Supreme Court of the United States

NVIDIA CORPORATION, ET AL.,

Petitioners,

v.

E. OHMAN J:OR FONDER AB, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN INSTITUTIONAL INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MATTHEW SUMMERS
BERGER MONTAGUE PC
505 Montgomery Street
Suite 625
San Francisco, CA 94111

MICHAEL DELL'ANGELO
ALEX B. HELLER
JOSEPH E. SAMUEL, JR.
BERGER MONTAGUE PC
1818 Market Street
Suite 3600
Philadelphia, PA 19103

PAUL BLAND
Counsel of Record
BERGER MONTAGUE PC
1001 G Street, NW
Suite 400 East
Washington DC 20001
(202) 559-9740
pbland@bm.net

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici represent more than $5 trillion of assets invested on behalf of retirees, employees, and other investors. Many have been plaintiffs in federal securities fraud lawsuits. This multifaceted perspective gives amici reason to seek the appropriate balance between effective enforcement of the Nation's securities laws—essential to protecting defrauded shareholders—and deterring baseless litigation, the costs of which are ultimately borne by shareholders.

Amici write to explain how the proposals NVIDIA and its amici offer here—rewriting the securities laws by imposing unreasonable burdens on allegations relating to corporations' internal documents and by creating sharp new limits on the use of experts in alleging fraud—have the potential to badly disrupt that balance. The proposals will harm shareholders and weaken the integrity of the market, and the Court should reject them.

Amici are listed below:

1. Allegheny County Employees' Retirement System ($950 million under management)
2. Association of Benefit Administrators
3. City of Cambridge Retirement System ($1.8 billion under management)
4. Employee Retirement System of the City of Providence ($450 million under management)

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[1] Amici affirm that no counsel for a party authored this brief in whole or in part, and no one other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

5. Fire & Police Pension Association of Colorado ($7.6 billion under management)
6. Michigan Association of Public Employee Retirement Systems ($30 billion under management)
7. The National Conference on Public Employee Retirement Systems (a network of trustees, administrators, public officials, and investment professionals who collectively oversee approximately $5 trillion in retirement funds)
8. North Carolina Retirement Systems ($123 billion under management)
9. Oklahoma Firefighters Pension and Retirement System ($3.5 billion under management)
10. Oklahoma Police Pension and Retirement System ($3.3 billion under management)
11. The Public Employee Retirement System of Idaho ($23.9 billion under management)
12. The Public School Teachers' Pension and Retirement Fund of Chicago ($12.5 billion under management)

INTRODUCTION AND SUMMARY OF ARGUMENT

The PSLRA was crafted to create a balance, where well-founded claims of securities fraud can move forward and weak claims are weeded out. Amici believe that this balance is extremely important on both ends. The private enforcement of America's securities law is important to maintaining fair and safe markets and is important for amici and the investors who rely on them. The PSLRA significantly raised the difficulty of pursuing lawsuits for securities fraud, but it still makes well-founded and strong cases possible. If this

Court agrees with Petitioners' proposals, however, it will erect unreasonable hurdles to block legitimate cases from proceeding, and this would harm the people who have entrusted their life savings to amici. The PSLRA already results in nearly half of all securities cases being dismissed, leaving meritorious cases to proceed and recover value for defrauded investors.

This is not an unfounded or weak case. Sophisticated investors are wary of wading into the remarkably volatile world of cryptocurrencies and securities that are tied to the extreme fluctuations of crypto products. From the detailed allegations of this case (and the SEC's follow-on action), it is evident that NVIDIA plainly understood this reality. It made a number of public statements that significantly downplayed its exposure to crypto markets. But the truth was something different, and NVIDIA turned out to be much more dependent upon the crypto world than it wanted investors to realize. When the crypto rollercoaster took one of its many dives, however, and this truth came out, many millions of dollars of value had been lost. Sophisticated investors who had been promised one kind of risk had been handed a very different one, and this lawsuit followed.

Armed with sweeping denunciations of how America's federal courts currently handle securities fraud litigation, NVIDIA asks this Court to substantially rework the law and hamstring investors in two new ways. First, NVIDIA asks this Court to supplant the current approach of having courts engage in a holistic inquiry as to whether all the allegations in a case give rise to a strong inference of scienter. In its place, NVIDIA proposes a novel requirement: that investors must allege the precise content of defendants' internal corporate documents. But many plaintiffs will not

have access to such documents, and this new requirement would result in closing the courthouse door even to very well-founded cases.

Second, NVIDIA asks this Court to create a new rule barring the use of expert findings in securities fraud complaints. This request ignores the fact that courts are well equipped to sort through strong and weak expert findings. They regularly determine whether expert findings do or do not support the elements of securities fraud claims. Petitioners' demands seem designed to erect new hurdles, unmoored from legal or policy justifications, for securities fraud cases, and are likely to harm many investors.

Amici respectfully urge this Court not to adopt either of Petitioners' proposals aimed at thwarting well-founded securities fraud cases. America's investors and markets deserve better.

ARGUMENT

I. Private enforcement is necessary for well-functioning securities markets.

A. Fraud has disastrous effects on markets.

Fraud creates major market distortions, increases volatility, and undermines investor confidence. Fraud hampers capital markets that are crucial to the growth of businesses and the functioning of a modern economy.

Securities markets operate on the premise that companies share reliable information about their performance with the market. Based on their trust in that information, professional investors put their beneficiaries' and clients' money into companies that they expect to perform well. Congress and the

SEC strictly regulate securities markets because they understand how crucial and fragile that trust is.

American capital markets are the "envy of the world" because they are the fairest and best policed. Amar Bhide, *Efficient Markets, Deficient Governance*, Harv. Bus. Rev. 128, 130–131 (1994). Markets in other wealthy countries are "fragmented, illiquid, and vulnerable to manipulation." *Id.* In contrast, the United States' pursuit of "securities law violations through both public and private enforcement with an intensity unmatched elsewhere in the world" contributes to the United States' lower cost of equity capital. John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 245–46, 309 (2007). Firms from around the world seek to be listed on U.S. markets and see corresponding benefits to their valuations. *Id.* at 284.

Fraud is anathema to trust. It causes market distortions by funneling capital toward businesses based on deception. This litigation provides a perfect case study of fraud causing misallocation of capital. Many of NVIDIA's investors were drawn to invest in what they thought was a growing company with strong fundamentals and without excessive exposure to cryptocurrency fluctuations. Pet. App. 31a–33a. Many investors would not have invested in NVIDIA without the false statements NVIDIA made to the public. In a well-functioning market in which NVIDIA made truthful representations, its stock price would have likely been 20–30% lower. Instead, NVIDIA inflated its stock price by deceiving investors through repeated false statements. At the same time, it likely drew capital away from other companies that made honest representations. When NVIDIA's fraud became exposed by the crash of the cryptocurrency market, the

bubble burst. NVIDIA's stock price crashed 28.5%, wiping out billions of dollars of value and prompting many investors to sell their shares and realize losses. J.A. 92–93.

The consequences of NVIDIA's fraud are far-reaching. Billions of dollars in pensions and other investment funds evaporated. *Id.* The importance of this cannot be overstated. Institutional investors safeguard the retirement and other funds of hundreds of thousands of individuals who have served their communities and the country honorably. Many of them live on fixed incomes and rely on the stability of their pension funds. NVIDIA's fraud injured them and many thousands of others.

Fraud also causes investors to lose confidence in both the specific company that committed fraud and securities markets as a whole. Investor confidence requires both "confidence that the laws will be obeyed and that, when they're not, that the fraudsters will be made to pay." Luis A. Aguilar, Commissioner, U.S. Securities and Exchange Commission ("SEC"), Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation (Apr. 4, 2011), https://www.sec.gov/news/speech/2011/spch040411laa.htm. The loss in confidence that will result if this Court renders it unreasonably difficult for the Plaintiffs to recover in this and similar cases would have tangible consequences for companies seeking capital.

There are over 54 million clients of registered investment advisers. SEC, *Fiscal Year 2025 Congressional Budget Justification Annual Performance Plan* (March 11, 2024), at 4 ("*SEC FY2025 Justification*"), https://www.sec.gov/files/fy-2025-congressional-budget-justification.pdf. Each of them depends on the careful U.S. enforcement architecture upholding "the largest,

most sophisticated, and most innovative capital markets in the world." *Id.* at 3. Congress, via the PSLRA, reaffirmed that "'private securities litigation [i]s an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)).

B. Private enforcement plays an important role in deterring and disciplining fraud, as well as compensating victims.

"[P]ublic and private rights are the two pillars on which enforcement rests." Elisse B. Walter, Commissioner, U.S. SEC, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program (Nov. 8, 2011), https://www.sec.gov/news/speech/2011/spch110811ebw.htm (hereinafter "Walter Remarks"). Given the constraints on government resources and the success of private litigation, private enforcement helps to deter fraud, punish wrongdoers, and compensate victims.

Government regulators are unable to identify and prosecute all securities fraud. The Securities and Exchange Commission oversees $110 trillion on capital markets and 40,000 entities. *SEC FY2025 Justification* at 3. In addition, the SEC is responsible for reviewing the disclosures and financial statements of over 8,300 reporting companies. *Id.* at 90. It must also evaluate the approximately 40,000 "tips and complaints" it receives annually. *Id*. at 19. The SEC recently solicited additional funds from Congress to oversee "a complex and ever-growing marketplace." *Id*. at 5.

This Court "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement" to public enforcement. *Tellabs*, 551 U.S. at 313 (describing role of litigation under implied private right of action to enforce Section 10(b)); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)) (Private securities class actions "are 'a necessary supplement to [regulatory enforcement] action.'"); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975). So has Congress. *See, e.g.*, S. Rep. No. 104-98, at 8 (1995) ("'[P]rivate rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program'") (quoting former SEC Chair Arthur Levitt); (H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (emphasizing the importance to investor confidence and market integrity). This Court has noted that "The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 174 n.10 (2008) (Stevens, J., dissenting) (quoting S. Rep., at 8, U.S. Code Cong. & Admin. News 1995, pp. 679, 687). And that "private litigation under § 10(b) continues to play a vital role in protecting the integrity of our securities markets." *Id*. at 174.

Further, empirical research has compared SEC-only investigations with class action-only lawsuits and found a greater deterrent effect and higher incidence of top officer resignations as a result of class actions. *See* Stephen J. Choi & A.C. Pritchard, *SEC Investiga-*

tions and Securities Class Actions: An Empirical Comparison, 13 J. of Empirical Legal Studies 27 (Mar. 2016). The data suggest that "private enforcement target[s] disclosure violations at least as precisely as (if not more so than) SEC enforcement." *Id*.

Private 10b-5 securities suits are perhaps the best means available, not only to provide "an avenue for appropriate compensation of victims," but to provide a "substitute" to public actions "for deterrence purposes." Donald C. Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post- Enron Reform Agenda*, 48 Vill. L. Rev. 1139, 1161 (2003). Securities fraud cases counteract the pernicious incentives that encourage people to lie. Research shows that "private enforcement . . . dwarf[s] public enforcement" in compensating victims of fraud, and thus private litigants are more successful than governmental agencies in recovering losses for individual investors. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1542–43 tbls. 2 and 3 (2006). "[W]hile the agency can require wrongdoers to give up the benefits they have received from violations, it cannot necessarily make the victims whole." *See* Walter Remarks*, supra*.

Annual settlement recoveries in securities class actions routinely exceed the SEC's recoveries for investors by several multiples. Securities class action settlements were approximately $4 billion in 2022 and 2023. *See* Cornerstone Research, *Securities Class Action Settlements: 2023 Review and Analysis*, at 3 (2024), https://www.cornerstone.com/wp-content/uploads/2024/03/Securities-Class-Action-Settlements-2023-Review-and-Analysis.pdf (hereinafter, "2023 Cornerstone Report"). By contrast, SEC recoveries distrib-

uted to investors were less than $1 billion in each of those years. *See* Addendum to Division of Enforcement Press Release dated November 14, 2023, https://www.sec.gov/files/fy23-enforcement-statistics.pdf.

The SEC's enforcement efforts focus largely on obtaining civil penalties, disgorgement, and injunctive orders barring defendants' unlawful conduct—but not necessarily recovering funds for investors. In each of the past four years, the aggregate penalties and disgorgement in SEC cases were more than five times higher than the SEC's aggregate recoveries for investors. *See* SEC, Addendum to Division of Enforcement Press Release, Fiscal Year 2023 (dated November 14, 2023), https://www.sec.gov/files/fy23-enforcement-statistics.pdf. It is clear that only a fraction of the SEC's limited resources is devoted to obtaining recoveries for investors.

This Court has long understood the congressionally mandated deterrent purpose of private securities suits, refusing to curtail the securities laws when doing so would "insulate those who commit securities frauds from any appreciable liability to defrauded investors" and "seriously impair the deterrent value of private rights of action" by diminishing "the incentives for [securities market actors] to comply with the federal securities laws." *Randall*, 478 U.S. at 664. This Court has been unwavering in its support for and recognition of the important role played by private securities fraud litigation in maintaining the integrity of the securities markets, deterring securities fraud, and compensating victims of fraud. *See, e.g.*, Barbara Black, *Eliminating Securities Fraud Class Actions Under The Radar*, 2009 Colum. Bus. L. Rev. 802, 808 (2009). This court must not waver now, as markets and the economy become ever more complex and

investors—including the institutional investor amici and their clients—become more at risk.

II. The PSLRA already imposes significant hurdles at the pleading stage.

A. The PSLRA strives for balance—only allowing likely meritorious cases to proceed.

Congress's aim in enacting the PSLRA was not to eliminate private securities litigation, but rather to strike a careful balance between the PSLRA's "twin goals: to curb frivolous . . . litigation" and "preserv[e] investors' ability to recover on meritorious claims." *Tellabs*, 551 U.S. at 322. Despite the "exacting" standards it put in place, "[n]othing in the PSLRA … casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." *Id.* at 313, and 320 n. 4 (quoting *Merrill Lynch* 547 U.S. at 81).

To achieve this balance, the PSLRA includes numerous guardrails to protect defendants against "perceived abuses of the class-action vehicle" in securities litigation. *Merrill Lynch*, 547 U.S. at 81. In addition to a heightened pleading standard, defendants in securities class actions enjoy limitations on recoverable damages and attorney's fees, a "safe harbor" for forward-looking statements, restrictions on selection of and compensation to lead plaintiffs, mandatory sanctions for Rule 11 violations, and a stay of discovery pending resolution of a motion to dismiss. *Id.* (citing 15 U.S.C. § 78u-4). These provisions are intended to cull only "those suits whose nuisance value outweighs their merits[.]" *Id.* at 82. In particular, the

pleading standards applicable to the falsity and scienter requirements of a securities fraud claim are already some of the most stringent in any substantive area of law.

On the other hand, the PSLRA does not require a plaintiff to prove her entire case at the pleading stage. Nor is a plaintiff "forced to *plead* more than she would be required to *prove* at trial." *Tellabs*, 551 U.S. at 328 (emphasis added). Consistent with that principle and with the overall balance the PSLRA promotes, a plaintiff "must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference." *Id.*

In amici's experience, the PSLRA is already striking the balance it sought to achieve. Even before *Tellabs*, forty-one percent of securities class actions between 1996 and 2008 were dismissed at the Rule 12(b)(6) stage.[2] This figure increased to sixty-two percent in the year immediately following *Tellabs*,[3] and has remained above fifty percent in most of the years since.[4] The well-founded cases that are not dismissed, by contrast, have survived the crucible of the PSLRA's exacting pleading standard before a single discovery request has been served and will then face further rigorous scrutiny at summary judgment. As a result,

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[2] Cornerstone Research, *Securities Class Action Filings: 2008 A Year in Review*, 16 (2008), https://securities.stanford.edu/research-reports/1996-2008/Cornerstone-Research-Securities-Class-Action-Filings-2008-YIR.pdf.

[3] Robert Malionek et al., *Tellabs v. Makor*, One Year Later, Sec. Law 360, at 1 (July 21, 2008).

[4] Cornerstone Research, *Securities Class Action Filings: 2023 A Year in Review*, 19 (2024), https://www.cornerstone.com/wp-content/uploads/2024/01/Securities-Class-Action-Filings-2023-Year-in-Review.pdf.

these meritorious cases are less likely to be overshadowed by frivolous or speculative lawsuits that can bog down the judicial system. By culling the universe of securities class actions to these highly meritorious cases, the PSLRA has enabled federal courts to focus their resources on bona fide allegations of fraud that, if left unaddressed, would cause substantial harm to millions of Americans.

B. This case is a good example of the pleading standards being applied properly, allowing a meritorious case to proceed to discovery.

This case is emblematic of the fact that the PSLRA is succeeding in its "twin goals" of preventing frivolous litigation and preserving meritorious cases. Backed by a considerable level of detail, Plaintiffs alleged with particularity that Defendants' statements during the relevant period "failed to state or substantially understated the extent to which NVIDIA's Gaming-segment revenues were based on sales . . . to crypto miners." Pet. App. 17a. Plaintiffs' theory of NVIDIA's fraud was supported by exceedingly detailed allegations and voluminous evidence of malfeasance.

Plaintiffs went so far as to identify, through confidential informants, the existence of specific documents that would prove the fraud (even if the actual contents of some, but not all, such documents, which are in defendants' possession, were not plead). Plaintiffs' extensive pre-complaint diligence included (i) interviews with former NVIDIA employees, (ii) in-depth analysis of international investment bank RBC's independent study of NVIDIA's actions, and (iii) the retention of a "knowledgeable and competent" consultant who performed a "detailed analysis" that supports

Plaintiffs' theory of why NVIDIA's conduct was fraudulent. *Id.* at 20a.

This is exactly the type of meritorious case that the PSLRA seeks to *promote*, rather than prevent. The Ninth Circuit correctly held that the totality of Plaintiffs' allegations "easily satisfie[d] the PSLRA pleading standard for falsity." Pet. App. 46a. This was especially true given that the complaint cited both internal NVIDIA revenue information and witness statements that were then corroborated by an independent RBC study and a retained expert. With respect to scienter, assuming the truth of Plaintiffs' allegations that NVIDIA CEO Jensen Huang's "detail-oriented manage[ment style]" makes it unlikely he would not know the source of over $1 billion in revenue, the Ninth Circuit correctly held that his requisite state of mind was not just *at least as likely* as any plausible opposing inference—as the PSLRA requires—but, indeed, "obvious." Pet. App. 55a.

To wit, the internal NVIDIA documents and the information supplied by confidential informants upon which Plaintiffs relied are exactly the type of particularized support that the PSLRA seeks to draw out early in litigation. Even if the complaint did not allege the actual contents of all of the alleged internal documents, the fact that Plaintiffs alleged their existence shows that the PSLRA is doing what it set out to do. Plaintiffs' complaint streamlines the dispute and allows Defendants to focus on showing that the alleged internal documents either do not exist or cut against Plaintiffs' theory. By contrast, requiring plaintiffs to be aware of and specifically allege the contents of a defendant's own documents would upset the PSLRA's careful balance, converting the 12(b)(6) inquiry into one more closely resembling summary judgment,

where a plaintiff bears a burden of production. The *Tellabs* Court specifically warned that this was not the PSLRA's intent. 551 U.S. at 324 n. 5.

The merits of this case are further reinforced by the fact that public SEC enforcement against NVIDIA *followed* the private action that Plaintiffs initiated. On May 6, 2022, four years after Plaintiffs brought suit and nearly two years after Plaintiffs filed the operative amended complaint, the SEC announced that it had settled charges against NVIDIA "for inadequate disclosures concerning the impact of cryptomining on the company's gaming business." Resp. Br. App. 1a-2a. The SEC's allegations were based on substantially the same conduct as the theory of fraud alleged here, demonstrating that private enforcement is crucial to the effective enforcement of the Nation's securities laws.

III. The standards Defendants propose would substantially damage private enforcement.

A. A categorical rule requiring plaintiffs to plead the actual contents of documents is untenable and will lead to significantly more unchecked fraud.

Defendants' proposed rule requiring plaintiffs to plead the actual contents of documents identified in a complaint would destroy the careful balance that Congress sought when it enacted the PSLRA. Rather than serve the PSLRA's "twin goals," *Tellabs*, 551 U.S. at 322, Defendants' actual contents rule would instead eliminate many strong cases merely for lack of a whistleblower who is either willing to steal company documents or can recall them with superhuman precision. Such a rule would inevitably lead to more

fraud and greatly curtail investors' ability to be made whole, causing significant harm to the integrity of domestic securities markets. The Court should reject it.

Internal company documents that would tend to prove allegations of fraud are often protected by company policy and by law. Defendants' proposed rule would all but require outright theft of these documents so that a securities fraud complaint can quote them verbatim, lest it be dismissed for failing to accurately describe the documents' "actual contents." This is exceedingly difficult in the world of modern information technology, where important company documents are carefully safeguarded or encrypted and restricted. *See, e.g.*, Hannah Bloch-Wehba, *The Promise and Perils of Tech Whistleblowing*, 118 Nw. U. L. Rev. 1503, 1508–1509 (2024) (describing "tight informational control" exerted by large corporations). Indeed, a "culture of secrecy" often prevails in today's corporate environment, with companies "aggressively exploit[ing] trade secrecy and corporate confidentiality beyond ordinary expectations." *Id.* at 1517.

Defendants' proposal is also entirely unworkable given the numerous counterincentives against information theft that exist for a rank-and-file corporate worker or even a higher level one. At a minimum, a would-be whistleblower would risk being accused of breaching obligations under a non-disclosure agreement. *See* Bloch-Wehba, *supra*, at n. 103–107. While some whistleblower protections may exist under the laws of certain states, this still leaves an individual in the unenviable position of justifying their breach after the fact. Also, certain protections—like SEC Rule 21F-17, for example—only protect disclosure to government officials like the SEC, not disclosure to private securities lawyers for purposes of pursuing class

action litigation. *See* 17 CFR § 240.21F-17. A whistleblower could also face criminal liability, a common-law conversion action or, depending on their position within a company, allegations of breach of fiduciary duty. These risks would result in a significant chilling effect on confidential informants' participation in revealing and prosecuting securities fraud.

Short of outright theft, a confidential informant would be charged with recalling specific details of internal company documents with far too much precision under Defendants' proposal. In amici's experience, some of the best (and most realistically attainable) scienter allegations involve witnesses who have information about reports that are provided to executives, yet either cannot remember or were not privy to specific details regarding the precise contents of those reports. A rule barring a complaint from using such reports to meet the PSLRA's particularity requirement unless they can be described with extreme detail *before discovery* will cause important and meritorious allegations of fraud to be left unheard.

Simply put, it is not easy to identify informants that are even willing to come forward in the first place, let alone someone who can recall the verbatim *contents* of individual documents. And when such individuals do come forward with important allegations of wrongdoing, it can be months or years after the fact and after the employee has left their position. Memories fade, but this is precisely why the American legal system has discovery—so that the parties can identify and exchange documents that test the theory alleged in the complaint and arrive at the truth.

The rule proposed here would turn that system on its head, requiring a plaintiff to already possess all the information it would otherwise seek in discovery

before discovery is allowed to begin. This effort to effectively apply a summary judgment standard at the pleading stage was specifically rejected in *Tellabs*. 551 U.S. at 324 n. 5. Indeed, the *Tellabs* Court made clear that a plaintiff need not come forward with an "irrefutable" inference "of the 'smoking-gun' genre," or even "the most plausible of competing inferences." *Id*. at 324. Rather, a plaintiff need only plead an inference of scienter "at least as compelling as any opposing inference." *Id.* The proposed actual contents rule directly contravenes this standard, effectively requiring a plaintiff to come forward not just with that "smoking gun," but one that is described verbatim.

Courts in analogous contexts have long recognized that information or documents evidencing fraud are unsurprisingly almost always in the exclusive possession of the party accused of fraud. For example, in assessing whether parties in patent litigation have met a similarly high pleading standard to allege the fraud-based doctrine of inequitable conduct, courts routinely acknowledge that the information necessary to prove the claim's elements—particularly intent—"ordinarily turn on evidence in" the exclusive possession of the accused party. *See, e.g.*, *Lipocine Inc. v. Clarus Therapeutics, Inc.*, No. 19-622-WCB, 2020 WL 4794576, at *7 (D. Del. Aug. 18, 2020); *C.R. Bard, Inc. v. Medical Components, Inc.*, No. 2:17-cv-00754, 2021 WL 1842539, at *4 (D. Utah May 7, 2021). And in cases assessing Rule 9(b) generally, it is commonplace for courts to find a complaint satisfies the particularity standard even though "evidence . . . is missing from the complaint" because that "evidence is . . . uniquely in [the defendant's] possession and easily obtainable through discovery." *Pasqualetti v. Kia Motors America, Inc.*, 663 F. Supp. 2d 586, 601 (N.D. Ohio 2009) (citing *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir.

1988)). Particularity, even under the PSLRA, requires a plaintiff to *allege* facts and then prove them after discovery, not come forward with *evidence* at the pleading stage. Defendants' proposed rule flips this basic principle of the American legal system on its head, and the Court should strongly reject it.

Amici understand the magnitude of the havoc that NVIDIA's proposed rule would wreak on defrauded investors. Even after the passage of the PSLRA, plaintiffs have recovered at least *$113 billion* for victims of securities fraud through 2023.[5] A large portion of these funds were recouped in cases brought by institutional investors like amici, who are responsible for the pension funds of millions of Americans, including firefighters, police officers, and other public employees.[6] It would be catastrophic if billions of

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[5] *See* Cornerstone Research, *Securities Class Action Settlements: 2006 Review and Analysis*, at 1 (2007), https://securities.stanford.edu/research-reports/1996-2006/Settlements-Through-12-2006.pdf (aggregating years 1996-2000); Cornerstone Research, *Securities Class Action Settlements: 2010 Review and Analysis*, at 1 (2011), https://securities.stanford.edu/research-reports/1996-2010/Settlements-Through-12-2010.pdf (aggregating years 2003-2006); Cornerstone Research, *Securities Class Action Settlements: 2015 Review and Analysis*, at 1 (2016), https://securities.stanford.edu/research-reports/1996-2015/Settlements-Through-12-2015-Review.pdf (aggregating years 2007-2013); 2023 Cornerstone Report (aggregating years 2014–2023).

[6] *See, e.g.*, *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997) ("through the PSLRA, Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors . . . Congress was certainly aware that an institutional investor will usually have 'the largest financial interest in the relief sought' in securities class actions. The legislative history of the Reform Act is replete with statements of Congress' desire to put control of such litigation in the hands of large, institutional investors.") (citing

dollars of securities fraud were suddenly immune from private enforcement.

B. A categorical rule against the use of expert findings harms markets, courts, and investors.

As technology, the economy, and securities markets become increasingly complex, the role of expert analysis in securities pleadings becomes more important. A categorical rule against the use of expert findings supporting pleadings would hamstring meritorious cases and undermine the effectiveness of private litigation in deterring fraud. Courts should have the benefit of the best evidence and analyses available as they holistically review complaints. *Tellabs*, 551 U.S. at 322–23.

Understanding complex consequences of false statements in opaque industries is often very challenging without expert insight. This case provides an instructive example. NVIDIA's technology is not well understood by people without a technical background. As a result, the expansive range of applications of its graphics processing units (GPUs) are unclear to most. Combining that with GPUs' use in cryptocurrency mining (which is similarly confounding) helps to explain why NVIDIA's fraud was so successful in misleading the public. For an outside entity, even a sophisticated institutional investor, to understand the effects of the fraud on NVIDIA's stock price ex ante would require a dizzying confluence of expertise, including in advanced computing technology, crypto currency mining specifications, crypto market dynam-

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Conference Report on Securities Litigation Reform, H.R.Rep. No. 369, 104th Congress, 1st Sess. 31, *reprinted* in 1995 U.S.C.C.A.N. 679, 733).

ics, stock valuation, investor aversion to crypto-specific risk, corporate finance, the economics of NVIDIA's particular business model, and secondary markets for GPUs. Pet. App. 19a–21a (explaining Prysm's hashrate calculations and other analyses). It is no surprise that the people who were able to break down NVIDIA's malfeasance were two Harvard Business School PhDs who specialize in the economics of blockchain. Pet. App. 20a.

Forcing litigants and courts to strip out all expert findings makes it harder to discern whether or not defendants made materially false and misleading statements. Given the complexity involved in securities fraud, expert analysis is helpful to both litigants and courts. *See, e.g., Nursing Home Pension Fund, Loc. 144 v. Oracle Corp.*, 380 F.3d 1226, 1233–34 (9th Cir. 2004). Judge Sanchez's dissenting opinion acknowledged that "[o]ur precedent permits a plaintiff in a securities fraud action to support allegations of falsity with an expert opinion." Pet. App. 69a.

Attorneys and judges are not PhD economists (usually). Forcing litigants to provide bare numerical data without expert analysis interferes with their ability to accurately and comprehensively outline the conduct and consequences alleged. NVIDIA's proposal also creates an elongated game of telephone because plaintiffs will still rely on expert analysis of complex fraud behind the scenes. NVIDIA would have plaintiffs parrot those analyses to judges without being able to relay experts' findings themselves. Judges without expert analyses would need to conduct mathematical calculations and make the types of inferences that experts have decades of training and experience making. *Host Int'l, Inc. v. MarketPlace, PHL, LLC*, 32 F.4th 242, 253 n. 13 (3d Cir. 2022) ("Federal courts are

not economists"). This is a waste of judicial resources and will impede accurate evaluation of the merits of cases. If NVIDIA prevails in this case, many meritorious cases will be discarded because the analyses needed to discern the fraud are too complex to be derived from bare facts.

The better option, which has long been upheld by the Court, is to empower district courts to review complaints holistically. *Tellabs*, 551 U.S. at 322–23. Contrary to doing mathematical analyses de novo, courts *are* well equipped to review complaints in their entirety and give expert analyses appropriate consideration. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999). Again, this litigation provides a good example of how the process is supposed to work. The district court scrutinized the pleadings and found the allegations to be insufficient. Pet. App. 6a. The district court did not blindly accept the Prysm analysis as alleged in the original complaint, which purportedly lacked sufficient particularity. *Id.* Plaintiffs proceeded to file the operative complaint, including substantial additional evidence and more detail regarding Prysm's analyses. The Court of Appeals scrutinized these allegations and analyses, ultimately finding that the pleading requirements had been met. Pet. App. 56a–57a.

This case is also emblematic of the part that expert analysis generally plays in securities complaints—a supporting role bolstering other evidence. The Court of Appeals held that the Prysm analysis (which it scrutinized) bolstered the findings of the independent RBC report, former employee allegations, and other facts. Pet. App. 44a–47a. When courts find that an expert's analysis has sufficient indicia of reliability and reinforces other evidence, it is appropriate for that

analysis to help contribute to a finding of falsity or scienter.

Excluding expert analysis wholesale will leave courts under-informed, violators unaccountable, and victims uncompensated. If expert analyses are conclusory or suspect, courts will rightly discount them. But in most cases, expert analyses are helpful and bolster allegations based on reliable facts and methods. Such cases are only going to be more prevalent as markets become increasingly complex. Denying vulnerable, defrauded investors from being made whole in these cases has no basis in law and will dampen the deterrent effect of private securities litigation.

CONCLUSION

In recent decades, Congress and this Court have successfully balanced the need for vibrant private securities litigation against the potential threat of vexatious litigation. Defendants in this case seek to upend that careful balance. Their proposals, which have no basis in law or policy, would undercut innumerable securities lawsuits irrespective of their merits. Accepting Defendants' proposals would fly in the face of Congress's intent while harming shareholders and securities markets. This Court should affirm the Court of Appeals.

Respectfully submitted,

MATTHEW SUMMERS
BERGER MONTAGUE PC
505 Montgomery Street
Suite 625
San Francisco, CA 94111

PAUL BLAND
Counsel of Record
BERGER MONTAGUE PC
1001 G Street, NW
Suite 400 East
Washington DC 20001
(202) 559-9740
pbland@bm.net

MICHAEL DELL'ANGELO
ALEX B. HELLER
JOSEPH E. SAMUEL, JR.
BERGER MONTAGUE PC
1818 Market Street
Suite 3600
Philadelphia, PA 19103

Counsel for Amici Curiae

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