No. 23-970

IN THE

Supreme Court of the United States

NVIDIA CORP. AND JENSEN HUANG,
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 AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including securities litigation. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that NVIDIA has advanced an approach to pleading that is unworkable and inconsistent with notice pleading and instead adopts a form of evidence-based pleading that goes beyond even what the civil rules replaced in 1938 and have no basis in the Private Securities Litigation Reform Act of 1995 (PSLRA). Permitting plaintiffs to allege with particularity the basis for their claims and the reasons for them satisfies the PSLRA and Rule 9(b), while also providing the courts with an adequate means of dismissing cases constructed on poorly supported allegations at the pleading stage. AAJ files this brief

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

to highlight these concerns, anchored in text, precedent, and the practicalities of securities litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

NVIDIA asks this Court to impose two novel requirements that are inconsistent with the congressional design and statutory text of the Private Securities Litigation Reform Act (PSLRA) and utterly unworkable. According to NVIDIA, a plaintiff must not only provide a particularized roadmap of the who, what, where, and when of any allegation of fraud and scienter and the basis for advancing those allegations, but it must also provide supporting evidence akin to the summary judgment stage of an action within the initial pleading without the benefit of compulsory discovery. This is a formula calculated to sound the death knell of this type of litigation because, as NVIDIA well knows, it creates an obstacle so high that plaintiffs cannot reach it without insiders leaking the relevant internal corporate documents at great personal cost and risk. At the same time, NVIDIA would raise the bar even higher by precluding plaintiffs from pleading falsity based in part on allegations informed by expert analysis of the available information.

The new categorical rules proposed by NVIDIA would impose a version of evidence-based pleading on plaintiffs even though such an approach has no support in existing law and conflicts with what the Federal Rules of Civil Procedure have required since

1938. Congress adopted the PSLRA against the background of the civil rules and did not carve out a wholesale exception to notice pleading for securities litigation. Instead, it made the applicable obligation to provide notice more specific but not impossible to achieve.

To NVIDIA, a plaintiff files a fatally defective lawsuit when the complaint pleads with particularity, based on accounts from past employees and other reliable sources, that a company's officers have engaged in specific misrepresentations or fraudulent statements at odds with their knowledge based on the types of information a company maintains and its key officers frequently (and, in this instance, obsessively) consult as a matter of course. The complaints in these cases show that these misrepresentations are knowingly propagated because they comprise the types of information upon which investors rely and therefore favorably affect the cash available to the corporation.

NVIDIA nonetheless argues that plaintiffs must obtain each actual document the pleading describes without the assistance of compulsory process and "allege what a document actually said." Pet. Br. 31. Anything less, Petitioners maintain, renders even the most detailed and logically compelling renditions of known information and consistent corporate practice coupled with contemporary public information nothing more than threadbare allegations designed to encourage judicial endorsement of a fishing expedition on the chance that something useful might be uncovered. Laying out that description of NVIDIA's position provides its own refutation, particularly in

light of the detailed and multi-sourced complaint at issue in this case.

Here, Respondents have put forth an extensive pleading, supported by whistleblowers knowledgeable about company routines, internal documents (including an internal slide presentation to top executives), expert evidence, and descriptions of compelling independent investigations that confirm the propriety of the allegations. To advance their argument that yet more is needed, NVIDIA engages in utterly fanciful characterizations of the allegations and their sources—essentially, rhetoric without foundation in fact, as Respondents' brief amply demonstrates.

Just as critically, NVIDIA asks this Court to take certain words out of the statute and replace them with requirements that would destroy the balance Congress struck. Congress enacted a heightened pleading regime but also authorized well-developed private securities actions to recover losses occasioned by a company's misrepresentations and fraudulent statements relating to a company's value.

For that reason, this Court has emphasized a holistic approach to evaluating complaints in this field, eschewing the atomistic examination of each allegation in isolation that NVIDIA seeks. NVIDIA demands that courts focus on the actual contents of internal documents described in the complaint but unavailable to Respondents, even if the information pleaded is comparable to available documents produced by the NVIDIA in the past. NVIDIA's approach constitutes nothing less than an abandonment of notice pleading

and the establishment of a very different regime that would require evidentiary support behind each allegation—an approach more appropriate to a summary-judgment motion than one that takes place at the pleadings stage.

Equally problematic is the impracticality of Petitioners' novel requirement. To obtain the type of documentation they claim plaintiffs must proffer in a pleading would mean that plaintiffs must convince current corporate personnel to leak authentic internal documents, regardless of the consequences to themselves, and provide eyewitness accounts of the personnel who examined them and then made public statements that investors would rely upon in contradiction to the documented facts. Such a requirement is impossible to meet, would require plaintiffs to recruit current whistleblowers whose cooperation would jeopardize not just their jobs but their careers as well, and change the law well beyond anything the PSLRA contemplated. NVIDIA's request of this Court is unworkable on any level.

ARGUMENT

I. THE PSLRA DOES NOT SUPPORT NVIDIA'S NOVEL APPROACH TO DECEPTION, MISREPRESENTATION, AND FRAUD IN SECURITIES LITIGATION.

A. NVIDIA's Proposed Requirement Would Impose an Atextual Mandate at Odds with Congressional Goals.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), largely effectuated through

Securities and Exchange Commission (SEC) Rule 10b–5, 17 C.F.R. § 240.10b–5 (2005), "broadly prohibits deception, misrepresentation, and fraud 'in connection with the purchase or sale of any security.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) (quoting 17 C.F.R. § 240.10b–5). To stem the flow of inadequately investigated complaints in securities litigation, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. §§ 77z-1, 77z-2, 78u-4, 78u-5). *See* H.R. Rep. No. 104-569, at 1 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 730 (statement of managers) (explaining the statute was aimed at deterring those cases with "only faint hope that the discovery process might lead eventually to some plaintiff cause of action").

That motivation to target "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," *Dabit*, 547 U.S. at 81, does not suggest that Congress did not still champion the value of legitimate securities litigation. Instead, the PSLRA sought to balance the strictures it imposed with an acknowledgement that private securities litigation serves as "an indispensable tool with which defrauded investors can recover their losses." *Id.* (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)); *see also Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to [federal government] criminal prosecutions and civil enforcement actions.").

The PSLRA provides no basis for this Court to engage in judicial legislation. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995) (discussing the Court's "obligation to avoid judicial legislation"); *Blockburger v. United States*, 284 U.S. 299, 305 (1932) (stating that where dissatisfaction with the plain meaning of a statute exists, "the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction").

B. The PSLRA Expressly Anticipates That Some Documentation Will Be Unavailable to Plaintiffs, But Its Unavailability Should Not Warrant Dismissal of the Action.

To construe a statute, the "starting point must be the language employed by Congress," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), for "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

This means this Court must look to the PSLRA's text to determine what a plaintiff must do to survive its heightened pleading requirement. As to the second Question Presented, but appearing first in the statute, the PSLRA requires the complaint to

> specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall

> state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1).

It is noteworthy that Congress attached the "particularity" requirement to allegations "made on information and belief." That venerable basis for an allegation in a pleading constitutes "a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff but he has sufficient data to justify interposing an allegation on the subject." *Vaughn v. Perea*, No. 20-7532, 2021 WL 5879176, at *2 (4th Cir. Dec. 13, 2021) (per curiam) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1224 (4th ed. 2020)). The phrase does not authorize "pure speculation," but instead remains appropriate where "'some of the information needed may be in the control of defendants.'" *Menard v. CSX Transp., Inc.*, 698 F.3d 40, 44, 45 (1st Cir. 2012) (quoting *Pruell v. Caritas Christi*, 678 F.3d 10, 15 (1st Cir. 2012)); *see also Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (finding that "pleading facts 'upon information and belief' where the facts are peculiarly within the control of the defendant" is sufficient) (citation omitted).

Moreover, as the Seventh Circuit explained, even under the heightened fraud pleading standard of Federal Rule of Civil Procedure 9(b), information and belief suffices as long as the plaintiff explains why the facts cannot be pleaded and "provide[s] the grounds for his suspicions." *United States ex rel. Hanna v. City of*

Chicago, 834 F.3d 775, 780 (7th Cir. 2016) (citation omitted).

Congressional authorization of pleading on the basis of information and belief belies the central thesis entertained by NVIDIA: that adequate pleading requires plaintiffs to say what the actual documents they describe recite to avoid dismissal. The sensible approach adopted by the Seventh Circuit in *Hanna* is consistent with the text of the PSLRA and recommends itself here as well.

C. The Text of the Scienter Provision Also Denies the Need for the Language of Actual Documents.

The PSLRA requires a plaintiff to support scienter by "stat[ing] with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). Although this Court has described this requirement as "[e]xacting," *Tellabs*, 551 U.S. at 313, it did not fundamentally transform the civil rules' adherence to notice pleading into the antiquated fact-pleading approach abandoned with the advent of today's civil rules in 1938.

The strong-inference standard does not imply a requirement that the plaintiff have precise knowledge of facts solely within the defendant's control, but instead imposes a requirement that the plaintiff plead a sufficient factual basis from which a reasonable person could infer the defendant had the requisite intent that, when compared to the "competing inferences rationally drawn from the facts alleged," is "at

least as compelling." *Id.* at 314. The competing inferences need only be plausible. *Id.* at 323. Requiring the actual text would impose a requirement that extends well past plausibility. Moreover, the allegations are not examined in isolation as NVIDIA demands, but "holistically." *Id.* at 326.

Nothing in that strong-inference formulation suggests that the plaintiff's allegations are deficient for failing to obtain documentation solely within the defendant's control and providing the actual contents of those documents within the pleading. Instead, it likely reflects a congressional understanding that "any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1301 (4th ed. 2024) (footnote omitted). After all, an opposing party's state of mind "is difficult to demonstrate at the pleading stage of litigation." *Vector Rsch., Inc. v. Howard & Howard Att'ys P.C.*, 76 F.3d 692, 700 (6th Cir. 1996) (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1301 (1990)).

In *Matrixx Initiatives, Inc. v. Siracusano*, this Court found that a complaint satisfied the PSLRA's scienter requirement when it alleged circumstances and general activities that conveyed concern about its product, yet still "issued a press release that suggested that studies had confirmed that Zicam does not cause anosmia when, in fact, it had not conducted any studies relating to anosmia, and the scientific evidence at that time." 563 U.S. 27, 49 (2011). This Court found that those allegations, "'taken collectively,' give rise to

a 'cogent and compelling' inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market.'" *Id.* (citation omitted). Nothing in the decision suggests that the plaintiffs failed to satisfy their burden because they did not plead the actual contents of the adverse reports in Matrixx's possession.

The holding in *Matrixx* respects the congressional textual choice that established the strong-inference rubric. Congress did not invent the standard but adopted it based on longstanding and well-considered Second Circuit caselaw. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). The Second Circuit's approach was widely regarded as the most stringent pleading approach among the circuits. 1D Harold S. Bloomenthal & Samuel Wolf, Going Public and the Public Corporation § 16:3 (Aug. 2024). Although the Second Circuit had utilized the standard and prescribed its elements, Congress left "strong inference" undefined. *Tellabs*, 551 U.S. at 314. When, as here, Congress does not provide a definition, this Court accords the term its "ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (citation omitted). To divine its definition, *Tellabs* looked to several dictionaries to define "strong" as sufficiently cogent to persuade or convince. 551 U.S. at 323. It also cited a dictionary definition of "inference" as "'a conclusion [drawn] from known or assumed facts or statements'; 'reasoning from something known or assumed to something else which follows from it.'" *Id.* (quoting 16 Oxford English Dictionary 949 (2d ed. 1989)). Whether viewed in the terms that *Tellabs*

utilized or its Second Circuit precursor, the standard provides no reason to doubt the propriety of the pleading before this Court.

The definitions recognize that the pleaded facts must provide a logical connection from known propositions to a conclusion for which there may not yet be direct evidence. It does not require, especially when pleading a securities case, that all facts be definitively known. *Cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) (permitting "inferences of intent drawn from the statutory scheme as a whole" to overcome interpretative presumptions). The strong-inference standard certainly does not require the type of evidence-based proof that NVIDIA insists upon.

D. The PSLRA's Particularity Requirement Does Not Mandate Some Exotic, Unfamiliar Pleading Requirement

The PSLRA does not stand alone in requiring pleading with particularity. It is a familiar standard articulated in Federal Rule of Civil Procedure 9(b) and adopted by the PSLRA. *See* H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.) (stating that Congress drafted the PSLRA "to conform the language to Rule 9(b)'s notion of pleading with 'particularity"). It "perpetuates the practice that existed at common law and under the codes, as well as the English procedure under the Judicature Act as it existed at the time the Federal Rules of Civil Procedure were promulgated." 5A Wright & Miller, *supra*, at § 1296.

Pleading with particularity is also the standard found in other federal statutes that involve allegations

of fraud. *See, e.g.*, False Claims Act, 31 U.S.C. § 3729(a)(1)(A)–(B); civil RICO, 18 U.S.C. §§ 1341, 1343. Where fraud is alleged, as under the PSLRA, plaintiffs "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b).

Federal courts have vast experience applying Rule 9(b)'s heightened pleading requirement to state-based fraud claims where diversity provides federal jurisdiction. *See, e.g.*, *Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001); *Roberts v. Francis*, 128 F.3d 647, 650–51 (8th Cir. 1997); *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir. 1996); *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985). These cases commonly require the pleading "specify the who, what, where, and when of the allegedly false or fraudulent representation." *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 29 (1st Cir. 2004) (citing *Powers v. Bos. Cooper Corp.*, 926 F.2d 109, 111 (1st Cir. 1991)); *see also In re Silver Lake Grp., LLC Sec. Litig.*, 108 F.4th 1178, 1191 (9th Cir. 2024) (same); *First v. Rolling Plains Implement Co., Inc.*, 108 F.4th 262, 271 (5th Cir. 2024) (same) (footnote omitted); *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1052 (11th Cir. 2015) (same) (citation omitted); *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011) (same); *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (same) (citation omitted).

While pleading with particularity occupies familiar ground, even if pre-PSLRA courts differed in its application, the fact that no court adopted NVIDIA's novel requirement that the contents of the actual document be part of the pleading demonstrates how exotic the standard NVIDIA advances really is.

II. THE PSLRA'S HEIGHTENED PLEADING REQUIREMENTS STILL FOLLOW SOME BASIC, COMMON PRINCIPLES AND DOES NOT SUBSTITUTE EVIDENCE-BASED PROOF FOR NOTICE PLEADING.

A. The Civil Rules, Including Notice Pleading, Still Apply and Inform the Inquiry

The PSLRA furthers the "twin goals" of "curb[ing] frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims." *Tellabs*, 551 U.S. at 322. It seeks "to force the plaintiff to do more than the usual investigation before filing his complaint" because of the great expense and reputational harm that flippantly advanced fraud claims can cause businesses and individuals. *Robert N. Clemens Tr. v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 847 (6th Cir. 2007) (quoting *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999)).

Perhaps more pointedly, the PSLRA represents a congressional judgment that the courts had struggled to apply Federal Rule of Civil Procedure 9(b) in a consistent or meaningful way, despite the fact that the rule also requires that fraud be pleaded with particularity. *See Tellabs*, 551 U.S. at 319 ("Courts of Appeals diverged on the character of the Rule 9(b) inquiry in § 10(b) cases."). To address that problem, Congress did not choose a wholly different pleading standard. Instead, Congress drafted the PSLRA "to conform the language to Rule 9(b)'s notion of pleading with 'particularity." H.R. Rep. No. 104-369, at 41.

Both before and after passage of the PSLRA, courts have properly and consistently insisted that

Rule 9(b) governs the pleadings. *Compare U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009), *with Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992) (Breyer, J.) (discussing the uniformity among circuit courts in requiring particularity consistent with Rule 9(b) before the enactment of the PSLRA); *see also Shields*, 25 F.3d at 1127 ("Securities fraud allegations under § 10(b) and Rule 10b–5 are subject to the pleading requirements of Rule 9(b)."); *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 462 (2d Cir. 2019) (holding Rule 9(b) applicable as informed by the PSLRA requirement that each alleged misleading statement be accompanied by an explanation of why it is misleading and, to the extent it is based on information and belief, "state with particularity all the facts on which that belief is formed") (quoting 15 U.S.C. § 78u-4(b)(1)).

Still, *Tellabs* teaches that a heightened pleading standard does not upend the usual process. Courts must still "accept all factual allegations in the complaint as true." 551 U.S. at 322. Moreover, in deciding a motion to dismiss under Federal Rule Civil Procedure 12(b)(6), courts engage in the usual analysis: "consider[ing] the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* By the same token, complaints must be read to afford reasonable inferences in a plaintiff's favor, *see Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 195 (2024), even if the resulting inference must be strong to satisfy the PSLRA's scienter requirement.

Of course, some competing standard considerations also apply. For example, a complaint that relies upon conclusory allegations and unwarranted inferences will not survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Still, because the PSLRA seeks "to curb frivolous, lawyer-driven litigation," *Tellabs*, 551 U.S. at 322, it is aimed at cases whose particularized allegations "'lack[] an arguable basis either in law or in fact.'" *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)).

The application of Rule 9(b)'s requirement of pleading with particularity "supplements but does not supplant Rule 8(a)'s notice pleading" and pointedly "does not 'reflect a subscription to fact pleading.'" *Grubbs*, 565 F.3d at 186.

> Although Rule 9(b)'s special pleading standard is undoubtedly more demanding than the liberal notice pleading standard which governs most cases, Rule 9(b)'s special requirements should not be read as a mere formalism, decoupled from the general rule that a pleading must only be so detailed as is necessary to provide a defendant with sufficient notice to defend against the pleading's claims.

U.S. ex rel. SNAPP, Inc. v. Ford Motor Co., 532 F.3d 496, 503 (6th Cir. 2008).

The particularity requirement decidedly does "not . . . reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct."

U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 503 (6th Cir. 2007); *see also Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) ("The application of Rule 9(b), however, 'must not abrogate the concept of notice pleading.'") (citation omitted); *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001) ("We must interpret the requirements of Rule 9(b) 'in harmony with the principles of notice pleading.'") (citation omitted).

In contrast to these holdings, NVIDIA wants plaintiffs to have fully developed their case without discovery, which was the regime that existed under fact pleading. It may even call for more than what satisfied fact pleading. It would require plaintiffs to plead specific categories of evidence, such as internal corporate documents, that plaintiffs are least likely to have, while precluding reliable expert evidence that supports the existence of the knowledge that the documents would demonstrate.

Today's civil rules, which still govern particularity pleading under the PSLRA, were "designed to escape the complexities of fact pleading under the codes, which had generated great confusion about how to allege the required 'ultimate facts' while avoiding forbidden 'conclusions' and 'mere evidence.'" Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986). NVIDIA's novel request to re-write the standards stands well outside the boundaries of any cognizable existing or prior American pleading regime.

B. NVIDIA Misapprehends the Role of Experts.

NVIDIA complains that expert opinion based on anything other than actual documents lacks particularity and asks, under its proposed standard, that courts "strip the complaint of the expert's opinions." Pet Br. 43. NVIDIA's stance misapprehends the role that experts play, particularly when the documents are unavailable for public examination.

While expert evidence is often notable for the opinions expressed, "some sentences that begin with opinion words like 'I believe' contain embedded statements of fact." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 184–85 (2015). Moreover, what some might view as opinion can still constitute concrete facts "specific enough to survive the pleadings stage" under the PSLRA. *See, e.g.*, *In re Synchrony Fin. Sec. Litig.*, 988 F.3d 157, 168 (2d Cir. 2021) (cleaned up).

Still, experts do not simply opine. They also do not replace the factfinder in determining ultimate facts. Instead, as the evidentiary rules establish, courts admit expert evidence or testimony because it "help[s] the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). To be admissible, the testimony must be "based on sufficient facts or data" and reflect "reliable principles and methods" reliably applied. *Id.* at 702(b), (c), & (d). Moreover, to the extent that an expert's testimony conveys an opinion, the expert may rely on facts or data not otherwise admissible "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." Fed. R. Evid.

703.

Of course, allegations in a pleading do not need to meet the same rigor as evidence introduced at trial, but instead need to provide notice of what is alleged so that the defendant may form a defense. *SNAPP*, 532 F.3d at 503. The allegations at issue abundantly served that purpose, as NVIDIA's attack on the complaint's use of its expert and the data utilized fully demonstrates the notice provided. NVIDIA defends by asserting that the information it has tells a different story. Still, nothing NVIDIA cites suggests that plaintiffs cannot rely on experts to draw strong inferences based on detailed market information and consistent corporate practices in order to state a claim.

Notably, NVIDIA does not attack the methodology utilized by the expert as much as the underlying facts relied upon. That difference is fatal to Petitioners' cause. A motion to dismiss does not provide a vehicle to dispute facts. Instead, the reviewing court must take the facts pleaded as true. *Tellabs*, 551 U.S. at 322. NVIDIA must show that no expert would rely on the evidence of past conduct to create a strong inference about scienter or information and belief about misleading statements that form the reasonable basis for the complaint at issue. Even in a criminal trial, where stronger rules about potential prejudice exist and the consequences are immeasurably higher, evidence of common criminal behavior through expert testimony, even if not specific to the actual defendant, is deemed useful to the trier of fact. *See Diaz v. United States*, 144 S. Ct. 1727, 1730 (2024).

The use of expert-based allegations in this complaint provides no occasion to insist upon ultimate evidence in a civil pleading.

III. NVIDIA'S NOVEL APPROACH TO PLEADING WOULD CREATE IMPOSSIBLE OBSTACLES FOR AN IMPORTANT TOOL IN RECOUPING LOSSES FROM CORPORATE MANIPULATION OF A STOCK'S VALUE.

The heart of NVIDIA's argument is that "[w]here plaintiffs fail to allege what a document actually said—and thus how it supports the inference plaintiffs ask the court to draw—they have failed to satisfy the particularity requirement." Pet. Br. 31. Similarly for the misrepresentation element of the case, NVIDIA asserts that the complaint is fatally defective because "[a]fter years of speaking with former employees, Plaintiffs cannot cite a single document that actually contradicted anything [the NVIDIA CEO] said." Pet. Br. 3. Both Questions Presented, NVIDIA maintains, require Respondents to obtain pre-suit possession of key documents in NVIDIA's sole possession and immune from discovery without compulsory process.

Such a requirement is impractical, because there is no appropriate way for a plaintiff to obtain those documents. When that is the situation and a party has advocated enhanced requirements under the PSLRA, this Court has recognized that the "practical consequences of an expansion … provide a further reason to reject petitioner's approach." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). Indeed, as with the scienter requirement reviewed in *Tellabs*,

this case requires the Court "to prescribe a workable construction" of the PSLRA. 551 U.S. at 322. The practicalities, as well as any sense of workability, inexorably lead to rejection of NVIDIA's approach.

NVIDIA's insistence on the actual text or documents, as well as current eyewitness employees of internal activity, assures that no action would ever be brought. As Judge Winter writing for the Second Circuit in an antitrust case explained, direct or "smoking gun" evidence "can be hard to come by, especially at the pleading stage." *Gamm*, 944 F.3d at 465 (citation omitted). Instead, circumstantial facts must support the requisite inference, which "may arise through the alleging of 'conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors.'" *Id.* (citation omitted). These "plus factors" include, as relevant to this case, "apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id. Cf. SEB Inv. Mgmt. AB v. Wells Fargo & Co.*, No. 22-CV-03811-TLT, 2024 WL 3579322, at *12 (N.D. Cal. July 29, 2024) ("[A] plaintiff sufficiently pleads scienter for corporate executives on a topic by demonstrating that they 'had access to and used reports documenting' trends in that topic.") (citation omitted).

Certainly, the factual support here of an unbroken pattern of conduct that supports a "strong inference" of scienter and an adequate basis for believing that the same pattern explains the misrepresentation suffices to survive a motion to dismiss. "Smoking gun" evidence should not provide the metric.

A. Currently Employed Whistleblowers, Especially Those Willing to Leak Internal Documents, Will Rarely Be Found.

Because NVIDIA asks this Court to require pleading the actual text of non-public, internal documents and whistleblowing by current rather than former employees, its approach would obligate plaintiffs to find existing employees willing to put their employment and their continued career in the corporate world more generally in jeopardy and provide potential litigants with documents they have no right to distribute.

Despite the protection afforded by the whistleblower provision of the Sarbanes-Oxley Act of 2022, 18 U.S.C. § 1514A(a), few employees will occupy a position that enables them to see all the elements of deceptive or fraudulent behavior and willingly bear the burden in defense of their own actions that, by whistleblowing, they engaged in a federally protected activity that immunizes them from retaliatory employment actions. 49 U.S.C. § 42121(b)(2)(B)(iv). After all, "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide.'" *Digit. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 155 (2018) (quoting S. Rep. No. 111-176, at 111, 112 (2010)). Not only does a whistleblower alienate a current employer but also likely faces ostracism from other employers within their chosen field for actions that demonstrate what might be regarded as disloyalty. Few employers will look favorably on people this Court once disapprovingly referred to as "so-called 'whistleblowers.'" *Bush v. Lucas*, 462 U.S. 367, 386 n.25 (1983).

Yet, the disincentives go well beyond that, because "[i]t is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one's employer, colleagues and friends." Pamela H. Bucy, *Private Justice*, 76 S. Cal. L. Rev. 1, 61 (2002). In fact, "the disincentives to whistleblowing are most potent when the fraud involved is a major one" because "the more serious the fraud, the more likely a whistleblower is to find herself out of a job and socially ostracized." Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. Rev. 91, 119 (2007).

Without whistleblowers from within the company, those who suffer losses because a corporation has misrepresented its value or engaged in outright fraud to win over new investors, injured parties will never acquire the types of specific details that the PSLRA requires. It is therefore critical that this Court recognize the practical limits of what may be asked of whistleblowers and not close off the litigation entirely by requiring even more from them, placing them in even greater jeopardy.

B. Even If Whistleblowers Prove Willing to Expose Deceptive or Fraudulent Corporate Conduct, the Consequences of Taking and Exposing Internal Documents Can Be Devastating

A further issue created by NVIDIA's approach comes from the process of obtaining internal corporate documents, pre-litigation. In a case in the Tenth Circuit in which this Court denied certiorari, an employee

of a corporation attempted to blow the whistle on what he believed to be corporate self-dealing. He asked a fellow corporate shareholder and consultant to a related corporate entity to gather supportive documentation to help him demonstrate the improper activity. *Xyngular v. Schenkel*, 890 F.3d 868, 871 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 803 (2019).

The employer subsequently initiated suit against the employee-whistleblower, seeking, *inter alia*, to terminate his employment, while also accusing him of misappropriating corporate resources. *Id.* The employee counterclaimed, attaching some of the corporate documents he received to his pleading. *Id.* The employer then moved for terminating sanctions against the counterclaim based largely on the pilfered corporate documents. *Id.* at 872.

The district court found that the employee "acted willfully, in bad faith, and with fault in a way that abused the judicial process in collecting [the documents] . . . [in] anticipat[ion of] litigation," including in his misappropriation of documents not only belonging to his employer but to "his other potential opponents" as well. *Id.* at 874. The Tenth Circuit affirmed and found that the employee's actions "amounted to clear and convincing evidence of [the employee]'s bad faith." *Id.* The court further held that the employee's prelitigation actions, even if characterized as part of whistleblowing, interfered with the judicial process by opting out of the discovery process "in anticipation of pursuing legal remedies." *Id.* The court held that there was no abuse of discretion on the part of the district court in dismissing the employee's

claims because his improper actions in obtaining documents prejudiced the parties and any other sanction "would incentivize future litigants to similarly misappropriate documents in anticipation of litigation." *Id.* at 875.

The Tenth Circuit further noted that "[o]ur sibling circuits have affirmed terminating sanctions where bad faith prelitigation conduct extended into court proceedings." *Id.* at 873. The court cited *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1307 (11th Cir. 2009) (affirming a sanction of dismissal for a party whose "ongoing ability to intercept confidential and privileged emails" both before and during litigation would make adjudication of his claims untenable), and *Jackson v. Microsoft Corp.*, 78 F. App'x 588, 589 (9th Cir. 2003) (affirming a terminating sanction for a party's prelitigation receipt of privileged information because defendant "would be unfairly prejudiced were the case to go forward"). Other circuits have also found no protection to employees for taking documents for whistleblower purposes. *See, e.g.*, *Palfrey v. Jefferson-Morgan Sch. Dist.*, 355 F. App'x 590 (3d Cir. 2009). These rulings make clear that internal documents of wrongdoing are off-limits to plaintiffs until compulsory process may be obtained. NVIDIA knows this, which is why it seeks to deter this type of litigation entirely through its argument to this Court.

IV. COURTS RECOGNIZE THAT UNAVAILABLE DOCUMENTS MAY BE DESCRIBED AND AWAIT PRODUCTION THROUGH DISCOVERY

NVIDIA asks this Court to go beyond what the PSLRA sets out. Where a plaintiff lacks access to the documents that confirm information gathered from non-documentary sources to describe the documents' content, NVIDIA still insists that a plaintiff plead the precise contents of documents, even if those documents exist solely under the defendant's control because they constitute the "most direct" way to allege scienter and show that company executives reviewed internal documents that contradict their public statements. Pet. Br. 30 (citing Pet. App 42a). The caselaw does not support only the most direct approach to pleading scienter or deceptive practices. Instead, plaintiffs often have no choice, despite diligent efforts, but to rely on "strong circumstantial evidence of conscious misbehavior or recklessness," which will ordinarily suffice. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). Courts also understand that scienter, as a state of mind, "must often be established indirectly." *Wu v. GSX Techedu Inc.*, No. CV 20-4457 (MEF) (JRA), 2024 WL 3163219, at *23 (D.N.J. June 25, 2024).

Experience demonstrates that courts confront the problem of unavailable documents with regularity and have not hesitated to find solutions based on the diligence that a plaintiff undertook. As one district court put it, a plaintiff "'need not corroborate every fact, [but] must provide an independent basis that goes towards corroborating the allegations such that they are reasonable.'" *SEB Inv. Mgmt.*, 2024 WL 3579322, at *12 (citation omitted). That court found communications with a confidential witness with "personal knowledge of certain issues," corroborating public

information, and circumstantial evidence of the defendant's involvement with certain workforce policies sufficient to "raise a strong inference of scienter." *Id.* It also found that "Plaintiffs' allegations that [corporate executives] received communications via their individual email addresses, or the Board email address suggest that they were aware of these issues." *Id.* at *11. The court did not require plaintiffs to plead the contents of those emails or conclusive evidence that the emails were read.

Other courts recognize that a plaintiff "can meet the pleading requirement [of the PSLRA] by providing sufficient documentary evidence *and/or* a sufficient description of the personal sources of the plaintiff's beliefs." *Teamsters Loc. 456 Pension Fund v. Universal Health Servs.*, 396 F. Supp. 3d 413, 452 (E.D. Pa. 2019) (quoting *Institutional Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 261 (3d Cir. 2009)) (emphasis added; ellipses in orig.).

Consider one other recent district court decision. Because "the PSLRA does not require a plaintiff to prove his case in his complaint," the court reasoned that a plaintiff, without the benefit of discovery must draft allegations about scienter from limited evidence "augmented by circumstantial facts and logical inferences." *Bos. Ret. Sys. v. Alexion Pharms., Inc.*, 556 F. Supp. 3d 100, 131 (D. Conn. 2021). Among the strong logical inferences the court found sufficient was an allegation about a confidential report written by outside counsel to the defendant. That report informed corporate executives of the unethical practices that

were central to the case's allegations of public misrepresentations.

Obviously, plaintiffs did not have access to the confidential report from defendants' counsel. Still, the Second Circuit provided useful guidance. It had held that a plaintiff must "specify the internal reports, who prepared them and when, how firm the numbers were or which company officers reviewed them." *Id.* at 134 (citing *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001)). The court found the plaintiffs "have specifically identified the report by stating when it was prepared and who prepared it," as well as what specific conduct the law firm identified as unethical. *Id.* Because there was no way for the plaintiffs to demonstrate that the corporate executives reviewed the report, the court applied logic to those allegations. It held the plaintiffs "alleged facts sufficient to support an inference that the information in the confidential report submitted by outside counsel was reasonably available" to the executives and were otherwise supported by pleaded actions which appeared to have occurred in response to the report. *Id.*

Similarly, another district court, also applying a common-sense logic, noted that "[a]lthough there is no smoking gun, the competing inference—that [the executives] were blissfully unaware—is neither cogent nor compelling. The allegations that they knew about the product defects and fourth-quarter supply-chain issues are straightforward." *San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc.*, No. 22-CV-6339 (AS), 2024 WL 1898512, at *11 (S.D.N.Y. May 1, 2024).

Ultimately, as this Court has long acknowledged, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 188 (1984). In PSLRA cases, the plaintiff must show enough prelitigation investigation to be entitled to discovery.

Importantly, there are already adequate tools to address NVIDIA's concerns about mischaracterizations of documents in the pleadings. If the plaintiffs' descriptions of the documents are inaccurate, courts may "consider documents 'integral to and explicitly relied on in the complaint,' that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint." *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 882 (S.D. Tex. 2001) (citing *Phillips v. LCI Intern., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999); *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808–09 (2d Cir. 1996)). Such an approach provides the type of quick dismissal of an inadequately investigated and pleaded action just as the PSLRA contemplates. Thus, there is no reason to adopt NVIDIA's novel requirement.

Detailed pleadings, corroborated through multiple other investigations, provide the level of assurance Congress required to maintain a securities action—and plaintiffs have thoroughly pleaded a sufficient factual basis to continue their action. Moreover, other

means exist to enable defendants to short-circuit litigation that has not shown sufficient diligence.

In the end, NVIDIA does not ask this Court to construe the PSLRA, but to refashion it to achieve one of its purposes, while ignoring its other goal of maintaining the viability of this type of litigation. That makes NVIDIA's request a policy argument, but such an argument is more "properly addressed to Congress, not this Court," because "[i]t is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit in this case.

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Respectfully submitted,

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