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 FORMER SEC OFFICIALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

DANIEL P. CHIPLOCK
MICHAEL J. MIARMI
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500
dchiplock@lchb.com
mmiarmi@lchb.com

SAMUEL H. RUDMAN
Counsel of Record
ROBBINS GELLER RUDMAN & DOWD LLP
58 South Service Road
Suite 200
Melville, NY 11747
(631) 367-7100
srudman@rgrdlaw.com

Counsel for Amici Curiae

October 2, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Whether plaintiffs seeking to allege scienter under the Private Securities Litigation Reform Act (PSLRA) based on allegations about internal company documents must plead with particularity the contents of those documents.

2. Whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are former Commissioners and senior officials of the U.S. Securities and Exchange Commission (SEC). Collectively, they have decades of experience in administering and enforcing the federal securities laws. Signatories are:

- Luis A. Aguilar, who served as a Commissioner of the SEC from 2008 to 2015, was originally appointed by President George W. Bush, and then reappointed by President Barack Obama. He has been a partner at McKenna Long & Aldridge, LLP (subsequently merged with Dentons US LLP); Alston & Bird LLP; Kilpatrick Townsend & Stockton LLP; and Powell Goldstein Frazer & Murphy LLP (subsequently merged with Bryan Cave LLP). During his time at the SEC, Commissioner Aguilar represented the Commission as its liaison to both the North American Securities Administrators Association and to the Council of Securities Regulators of the Americas. He also served as the primary sponsor of the SEC's first Investor Advisory Committee. He began his legal career as an attorney at the SEC.
- Robert Jackson Jr., who served as Commissioner of the SEC from 2018 to 2020, was appointed by President Donald J. Trump. He is now the Pierrepont Family Professor of Law and Co-Director of the Institute for Corporate Governance and Finance at the New York University School of

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* 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 this brief.

Law. Previously, he served as a senior policy advisor in the U.S. Treasury Department.

- Allison Herren Lee, who served as a Commissioner of the SEC from 2019 to 2022 (and as Acting Chair in 2021). Previously, she served for over a decade in various roles at the SEC, including as Counsel to a Commissioner and as Senior Counsel in the Division of Enforcement's Complex Financial Instruments Unit. In addition, she has served as a Special Assistant U.S. Attorney. Prior to government service, she was a partner at Sherman & Howard LLC, focusing on securities, antitrust, and commercial litigation. Currently, she is an Adjunct Professor and Senior Research Fellow at New York University School of Law.
- Bevis Longstreth, who served as a Commissioner of the SEC from 1981 to 1984, was appointed twice by President Ronald Reagan. He has also served as an Adjunct Professor at Columbia University School of Law and on various boards, including the Board of Governors of the American Stock Exchange and the Pension Finance Committee of The World Bank.
- Jane B. Adams, who served as Acting Chief Accountant of the SEC in 1998, and Deputy Chief Accountant from 1997 to 2000. She advised and represented the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters.
- Andrew D. Bailey, Jr., who served as Deputy Chief Accountant of the SEC from 2004 to 2005. He has also served as President of the American Accounting Association and the Head of the Department of Accountancy at the University of Arizona, as well as at the University of Illinois.

- Matthew Cain, Ph.D., who served as Advisor to Commissioner Robert J. Jackson in 2018, and previously as a financial economist at the SEC. He currently is a Senior Fellow at the New York University School of Law.
- Tyler Gellasch, who served as Counsel to Commissioner Kara Stein from 2013 to 2014. He currently is President and CEO of the Healthy Markets Association, an investor-focused trade group.
- Parveen P. Gupta, who served as the Academic Accounting Fellow in the Division of Corporation Finance of the SEC from 2006 to 2007. He is currently the Clayton Distinguished Professor of Accounting at Lehigh University and a member of the Investor Advisory Group of the Public Company Accounting Oversight Board. From 2007 to 2016, he served as Chair of Lehigh's Department of Accounting in the School of Business.
- Micah Hauptman, who served as Counsel to Commissioner Caroline A. Crenshaw from 2020 to 2022. He currently is the Director of Investor Protection at the Consumer Federation of America.
- Renee Jones, who served as the Director of the Division of Corporation Finance at the SEC from 2021 to 2023, leading a team of more than 400 lawyers, accountants, and analysts. She currently is a Professor of Law and Dr. Thomas F. Carney Distinguished Scholar at Boston College Law School.
- Thomas R. Weirich, who served as the Academic Accounting Fellow in the Office of Chief Accountant of the SEC from 1990 to 1991. He was also Chair of the Michigan Board of Accountancy and head of the School of Accounting at Central

Michigan University, where he is currently Professor of Accounting.[2]

Amici have a common interest in ensuring a proper interpretation of the statutory framework for pleading securities fraud put in place by Congress. *Amici* are in agreement with other SEC officials appearing as *amici* in support of certiorari for this case that "[g]iven the SEC's limited resources, lawsuits initiated by private parties are an important complement to the agency's own enforcement actions."[3]

In that regard, *amici* are concerned about the imposition of ill-advised barriers to private actions that reduce their impact on compliance with the federal securities laws. *Amici* are also concerned that the approach sought by Petitioners may adversely affect the SEC's ability to enforce the federal securities laws because, although the SEC is not subject to the PSLRA, courts often look to the PSLRA in interpreting the requirements of Federal Rule of Civil Procedure 9(b), requiring that fraud be pleaded with "particularity."[4]

---

[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

[3] *See* Brief of Former SEC Officials as Amici Curiae Supporting Petitioners (Former SEC Officials Cert. Br.) 17.

[4] *See, e.g.*, *City of Warren Police and Fire Ret. Sys. v. Prudential Fin. Inc.*, 70 F.4th 668, 680 (3d Cir. 2023) ("Like Rule 9(b), the PSLRA requires the pleadings to identify 'each statement alleged to have been misleading' and to specify 'the reason or reasons why the statement is misleading.'"); *SEC v. Yuen*, 221 F.R.D. 631, 635 (C.D. Cal. 2004) (finding PSLRA caselaw "instructive" to "offer guidance" in interpreting SEC's Rule 9(b) pleading requirements); *SEC v. Patel*, No. 07-CV-39-SM, 2009 WL 3151143, at *12 (D.N.H. Sept. 30, 2009) (relying on PSLRA caselaw to interpret Rule 9(b)'s particularity requirement).

SUMMARY OF ARGUMENT

Private enforcement of the federal securities laws is vital to the integrity of U.S. capital markets. It leverages market and competitive forces and can be faster, more efficient, and more effective than regulatory enforcement. Moreover, given the SEC's limited resources, private actions act as a critical complement to the agency's enforcement efforts. Without the ability of private investors to seek their own redress, significant violations of securities laws would go unchecked, harming investors and the broader market. These harms are not theoretical – just in the decades since the PSLRA was enacted, capital markets have experienced wave after wave of large-scale fraud.

It's no surprise then that Congress sought to protect meritorious claims in passing the PSLRA. There is much focus in Petitioners' brief on the PSLRA's goal of curbing frivolous lawsuits. This framing, however, disregards a significant overarching goal of the PSLRA, which was to preserve and protect meritorious claims. Congress could have simply prohibited private enforcement, but instead chose to ratify its importance, seeking to better calibrate how such claims may be brought using a variety of measures including pleading standards.

The thrust of Petitioners' arguments would be to create bright-line rules requiring plaintiffs to have possession of internal company documents and databases before discovery, and to preclude the use of experts at the pleading stage (unless those experts have access to internal company documents). Neither is supported by the law or good policy. Currently, roughly half of putative securities fraud class actions are dismissed on the pleadings. Bright-line rules essentially requiring plaintiffs to secure documents

prior to discovery would push that percentage significantly higher without empirical evidence to support such a drastic change. Not only is this unwise from the standpoint of achieving compliance with the federal securities laws, it is inconsistent with this Court's instruction in *Tellabs* and unsupported by the language of the PSLRA.

In this case, Respondents have provided detailed, specific allegations that NVIDIA's CEO, Jensen Huang, was aware of the significant demand for gaming graphics processing units (GPUs) from cryptocurrency miners, yet misrepresented this demand when investors inquired about it. These detailed allegations even include Huang assuring analysts that he was closely monitoring crypto-mining demand, coupled with an internal video showing him reviewing sales data. The allegations detail the specific databases that kept information on crypto-related sales, how often that information was provided to Huang, and what that information actually reflected in the Chinese market. Far from vague allegations about unspecified documents that "would have shown" information conflicting with what Huang said, these allegations are remarkably detailed and, taken as true and considered holistically as *Tellabs* requires, support a strong inference of scienter. The facts alleged here reflect exactly the type of well-pleaded scienter claims that Congress sought to protect when passing the PSLRA.

Finally, the effort to create a blanket exclusion of expert analysis at the pleading stage is similarly unsupportable under the PSLRA. The statute requires that plaintiffs plead falsity with particularity but does not limit the types of information that can be used to establish a claim. Further, it is illogical to preclude expert analysis *because* it came from an expert. The

experts in this case offered an estimate of the magnitude of crypto-mining demand in the gaming unit using transparent data and reasoning. There is no dispute that a court would consider this estimate if it were made directly by Respondents; that these allegations are supported by expert analysis renders them *more* plausible, not less. It is similarly illogical to disregard an expert analysis because it is based on "generic market data" (even accepting Petitioners' derisive framing). Market data of the type used by Respondents' experts is central to how capital markets operate and how investors make investment decisions and assess the accuracy of public statements.

This Court should decline to create rigid, categorical rules that would essentially replace the sensible and flexible approach set forth in *Tellabs*, which is consistent with the PSLRA's text and purpose. Petitioners' proposed rules, by contrast, are unsupported by the PSLRA and existing case law, and would create significant additional barriers to private enforcement, thereby reducing what has proven to be an essential and effective means of holding corporate wrongdoers accountable.

ARGUMENT

I. Private Enforcement of the Federal Securities Laws is "Crucial to the Integrity of Domestic Capital Markets."[5]

A central point of agreement among Congress, this Court, and former SEC Commissioners from both sides of the aisle[6] is the vital importance of investors'

---

[5] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 n.4 (2007).

[6] *See, e.g.*, *Securities Investor Protection Act of 1991: Hearing Before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, 102d Cong. (1991), at 15-16 (quoting then-Chairman Richard C. Breeden as saying "[p]rivate actions … have long been recognized as a 'necessary supplement' … and as an 'essential tool' in the enforcement of federal securities laws. Because the Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions perform a critical role in preserving the integrity of our securities markets."); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) ("The securities statutes seek to maintain public confidence in the marketplace . . . . They do so by deterring fraud, in part, through the availability of private securities fraud actions."); Former SEC Officials Cert. Br. 4 ("Given the SEC's limited resources, lawsuits initiated by private parties are an important complement to the agency's own enforcement actions."); Elisse Walter, *The Interrelationship Between Public and Private Securities Enforcement*, Harvard Law School Forum on Corporate Governance (Dec. 11, 2011), https://corpgov.law.harvard.edu/2011/12/11/the-interrelationship-between-public-and-private-securities-enforcement (arguing that "both the public and private aspects of securities enforcement are critical, that they complement each other, and that they are interrelated"); Robert J. Jackson, Jr., Former Comm'r, Sec. Exch. Comm'n, Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration (Feb. 26, 2018) (describing "policing corporate wrongdoing" as "a team effort," with "the government and investors

ability to seek their own redress for violations of the federal securities laws. The SEC and capital markets more broadly have long benefitted from the market discipline imposed by harmed investors empowered to combat the devastating consequences[7] of fraud alongside the efforts of the SEC.

With a limited budget, and roughly 4600 employees, the SEC is responsible for the oversight of roughly 40,000 entities, and also must review the disclosures of approximately 7800 reporting companies.[8] Enforcement resources are stretched thin, and the SEC alone simply cannot ensure a level playing field for honest market participants.

---

working together to make sure insiders who betray investors are held to account").

[7] *See, e.g.*, U.S. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (2011), at 389 (finding significant damage to the U.S. economy caused by the 2008 financial crisis, and observing ultimately that "[s]eventeen trillion dollars in household wealth evaporated within 21 months, and reported unemployment hit 10.1% at its peak in October 2009"); *see also* Adena Friedman, *Nasdaq CEO: U.S. economic growth would be .05% higher if it weren't for fraud*, Fortune Magazine (Sept. 12, 2024), https://fortune.com/2024/09/12/nasdaq-ceo-us-economic-growth-fraud-finance/ ("If financial crime were a sector of the U.S. economy, it would be on par with the lodging and food services sector—with money laundering activity accounting for 3.1% of the national GDP in 2023.").

[8] *See* 2023 SEC, Fiscal Year 2023 Agency Financial Report (Nov. 15, 2023), at ii. (describing the roughly "17,000 registered funds, 15,000 investment advisers, 24 national securities exchanges, 99 alternative trading systems, 50 securities-based swap dealers, 3,500 broker-dealers, and seven active registered clearing agencies"the agency regulates, as well as the "7,800 reporting companies" reviewed by the Commission).

Private enforcement thus acts as a much needed supplement to the SEC's enforcement efforts, and is often a more effective solution for harmed investors and capital markets.[9] It has been called an "essential tool,"[10] a "critical … complement [to SEC enforcement],"[11] and the "last line of defense keeping insiders from committing fraud."[12] As this Court put it, private enforcement is a "necessary supplement to Commission action" and a "most effective weapon" in enforcing the federal securities laws.[13] Thus, it is no surprise that, as this Court noted, in passing the PSLRA Congress "ratified the implied [private] right of action."[14]

---

[9] *See* Jackson, *supra* note 6 (comparing the $19.4 billion recovered in private lawsuits to the $1.75 billion recovered by the SEC in the same cases); Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. OF EMPIRICAL LEGAL STUD. 27, 46 (2016) (assessing empirical evidence that "suggest[s] private class action attorneys target disclosure violations more precisely than the SEC"); Rick Fleming, Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders (Feb. 24, 2018) (noting that "investors have remedies that may not be available to regulators, the most important of which is the ability to seek full restitution of their losses instead of merely disgorging the bad actor's ill-gotten gains.").

[10] *See Securities Investor Protection Act of 1991: Hearing Before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, 102d Cong. (1991), at 15 (quoting then-Chairman Richard C. Breeden describing private action "as a 'necessary supplement' to actions brought by the Commission").

[11] Walter, *supra* note 6.

[12] Jackson, *supra* note 6.

[13] *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

[14] *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Congress . . . ratified the implied right of action after the Court moved away from a broad willingness to imply

In the decades since the PSLRA's passage, capital markets have suffered wave after wave of large-scale fraud. This has run the gamut from the improper manipulation of access to IPOs in the 1990s, to accounting fraud in major corporations like Enron, the stock options backdating scandal, mutual fund late-trading and market-timing practices, rampant fraud related to residential mortgage-backed securities and collateralized debt obligations, Ponzi schemes perpetrated in major investment funds, the rigging of benchmark rates such as LIBOR and FOREX, and more recently massive fraud related to cryptocurrency and other digital assets – just to name a few. In fact, fraud within the financial sector may be more common than in other sectors of the economy.[15]

The SEC simply cannot go it alone. The private bar, harnessing market-driven financial incentives, is often the prime source of investor recovery for the immense harm wrought upon unsuspecting investors

---

private rights of action."); *see also* Brief of Professor Joseph A. Grundfest as *Amicus Curiae* in Support of Petitioner 15, *NVIDIA*, No. 23-970 (9th Cir. Aug. 19, 2024) (Grundfest Ct. App. Br.) (noting that "[s]ubsequent congressional action, including the PSLRA's adoption, can also be viewed as ratifying the Rule 10b-5 implied private right of action).

[15] Neil Fligstein & Alexander Roehrkasse, Dep't. of Sociology, U.C. Berkeley, All the Incentives Were Wrong: Opportunism and the Financial Crisis, Address at Yale Law School: Law and Ethics Conference (Feb. 15-16, 2013) at 38 ("The financial sector represents a market domain where fraud and collusion are consistently more common than in other domains, and this is in part due to the inherent difficulty in assessing financial crimes."); Richard B. Freeman, *Financial crime, near crime, and chicanery in the wall street meltdown*, 32 J. OF POL'Y MODELING 690, 701 (2010) (describing the financial crime wave of the 2000s as "probably the greatest financial crime wave in our history").

and our capital markets during these widespread frauds.[16] As it stands, roughly half of the cases brought by investors are dismissed at the pleading stage.[17] Given the necessity of a well-functioning private enforcement mechanism, it would be imprudent to judicially circumscribe these cases even further, especially by departing from this Court's recently established precedent in *Tellabs*, which sensibly declines to use bright-line rules that can result in arbitrary and unduly restrictive outcomes. The holistic approach that *Tellabs* and this Court's other securities fraud jurisprudence adopt[18] is the right one because it provides significant flexibility to arrive at a sensible conclusion regarding the sufficiency of a complaint based on the facts of the particular case.

---

[16] *See* Jerry Silk & John A. Meade, *A Comparative Discussion of Private versus Government Recoveries in Securities Fraud Cases*, 26 The NAPPA Report No. 1, Vol. 26 (February 2012), at 1-2 (compiling data showing superior recovery amounts by private litigants over the SEC in twenty-three of the top securities fraud settlements, and noting that such data shows "private enforcement of U.S. securities laws has produced an enforcement regime far more effective and efficient at recovering investors' losses").

[17] Cornerstone Research, *Securities Class Action Filings: 2023 Year in Review*, at 19 (2024).

[18] *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 249-50 (1988) (rejecting a "bright-line rule for materiality" in the § 10(b) and Rule 10b–5 context in favor of a standard "depend[ent] on the facts" and "to be determined on a case-by-case basis"); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 30 (2011) (concluding that "the materiality of adverse event reports cannot be reduced to a bright-line rule," and instead requiring the facts to be taken collectively).

II. Scienter: This Court Should Not Overturn the Holistic Analysis Required by *Tellabs*.

A. This case represents exactly the kind of potentially meritorious claims that Congress sought to protect when passing the PSLRA.

The complaint's strength in this case is evidenced, in part, by the rich depth of information pleaded supporting a strong inference of scienter including:

- an internal, centralized sales database accessed by Huang quantifying global GeForce[19] sales to crypto-miners;
- quarterly meetings at which specific GeForce sales data was presented to Huang;
- weekly reports requested by and sent to Huang showing huge demand for GeForce GPUs from crypto-miners;
- usage data sent to Huang monthly from NVIDIA's own software program within the GeForce GPUs that directly showed specific utilization by end users;
- an internal study proving that NVIDIA measured GeForce sales to crypto-miners;

---

[19] "GeForce" is the brand of the GPU considered NVIDIA's "flagship product line" and "crown jewel." *See* First Amended Consolidated Class Action Complaint (Compl.) ¶¶1, 40. While initially developed as a tool for rendering graphics in video games, these GPUs have "since expanded to encompass a variety of other applications." *Id*. ¶38. One such application was crypto-mining, as "GEForce GPUs were particularly adept at quickly processing the computations required" for mining. *Id*. ¶3.

- a direct, public statement from Huang that they "monitor … literally every day" the end usage of their products;[20]
- specific data tracking the China market showing that throughout 2017, 60% to 70% of GeForce revenue came from sales to crypto-miners; and
- an internal video actually showing Huang accessing and reviewing sales data.

Far from vague allegations about internal documents that "would have" existed, these allegations specify the provenance and location of the information, how often it was presented to Huang, and what some of the information showed. Also, and perhaps somewhat rare in terms of direct evidence, are the public statements from Huang himself who, in addition to the statement above, reassured analysts in 2017 in response to their concerns about NVIDIA managing volatility in the cryptocurrency market, admitted that he "stays very, very close" to the market and knows its "every single move," coupled with evidence of an internal video showing him carefully reviewing and responding to sales data.

Under the circumstances, it is quite logical that Huang would be close to this type of data. The issue

---

[20] Petitioners try to downplay the significance of this statement because it occurred before the class period began. *See* Brief for Petitioners (Aug. 13, 2024) (Pet. Br.) 38 ("Plaintiffs also cite Huang's supposed awareness of anecdotal reports of in-person miner purchases before the class period began and before the Crypto SKU launched . . . . Needless to say, these do not contribute to an inference about Huang's knowledge of what cryptocurrency miners were purchasing during the class period . . . ."). However, it is difficult to imagine that the focus on end usage would abate during the class period given that crypto-mining only grew in importance to NVIDIA over that timeframe.

was significant enough for NVIDIA to create an entirely new product line and business reporting segment, and then pay its customers for the information needed to track its success. Indeed, it defies logic to imagine a CEO who doesn't know what is driving a 52% year-over-year increase in revenues for the company's largest and most important business segment.[21]

One additional indication of the strength of Respondents' allegations is found in the parallel SEC action, which includes specific findings of fact that NVIDIA "received information indicating that cryptomining was a significant factor in year-over-year growth in NVIDIA's Gaming GPUs revenue."[22] The SEC, with different priorities and resources, only brings charges in a fraction of the cases brought by the private bar.[23] Historically, this overlap is associated with higher quality private cases that are less likely to be dismissed, settle more quickly and for greater sums.[24]

---

[21] SEC Order, *In the Matter of NVIDIA Corp.*, Admin. Proc. File No. 3-20844 (May 6, 2022), at ¶8 ("The company's Gaming revenue increased by 52%, year over year for the second fiscal quarter 2018, and by 25%, year over year for the third fiscal quarter 2018.").

[22] *Id.* ¶7.

[23] Laarni T. Bulan, Ellen M. Ryan, & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2018 Year and Analysis* at 12 (2019) (finding a corresponding SEC action in 7–23% of settled securities class actions over a ten-year period).

[24] *See* Choi et al., supra note 9, at 61-64 (less likely to be dismissed); James D. Cox, Randall S. Thomas, & Dana Kiku, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 767 (2003) (settle more quickly); James D. Cox, Randall

B. Petitioners seek a bright-line rule that is both inconsistent with *Tellabs* and largely insurmountable at the pleading stage.

1. *Tellabs* Precludes a Bright-Line Rule.

Petitioners assert that they don't seek a bright-line rule essentially requiring private plaintiffs to have possession of internal company documents and databases at the pleading stage.[25] They argue that only if a plaintiff's entire case for scienter is "built [around] … internal documents and data" would they be required to plead such documents with the level of detail Petitioners endorse.

First, as explained above, Respondents' scienter allegations are not premised entirely on the existence of internal documents, but also include detailed information by confidential witnesses regarding Huang's focus on crypto demand and his management style, as well as Huang's own public assertion that he monitors the relevant information. Second, also as explained above, the relevant documents have in fact been pleaded with a high degree of particularity. Greater specificity would essentially require current possession of these documents and databases, which is

---

S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 376–77 (2008) (settle for greater sums). While NVIDIA was able to settle the SEC matter with negligence-based antifraud charges, there could be numerous institutional reasons why the SEC would find it more efficient for harmed investors to reach a settlement on a negligence-based charge than to litigate a scienter-based charge.

[25] *See* Pet. Br. 40.

almost always precluded at the pleading stage given the PSLRA's mandatory discovery stay. And third, Petitioners ask this Court to parse through these detailed allegations, one by one, rejecting each individually, without regard to the holistic view of their strength – exactly the approach that *Tellabs* prudently rejects.[26]

In *Tellabs* this Court provided a roadmap for addressing the PSLRA's heightened pleading requirements. Allegations are sufficient where "a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged."[27] *Tellabs* requires a holistic analysis, whereby courts must consider the "complaint in its entirety" including "*all* of the facts alleged, taken collectively." Courts may not resolve the issue on the basis of "any individual allegation, scrutinized in isolation."[28]

This Court explicitly rejected a categorical or "bright-line" approach to pleading a strong inference of scienter, reiterating instead that "allegations must be considered collectively." In that vein, the Court cautioned against requiring a "smoking gun" or an inference that is essentially "irrefutable."[29]

---

[26] *See Tellabs*, 551 U.S. at 310 ("[T]he court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically.").

[27] *Id.* at 310.

[28] *Id.* at 322–23.

[29] *Id.* at 324-25.

2. Petitioners Essentially Advocate for a Requirement that Plaintiffs Possess Internal Documents.

Petitioners initially claim that the Complaint fails to allege *what* the internal documents actually say. This is demonstrably incorrect in that the Complaint specifically states that internal sales data showed "60% to 70% of NVIDIA's GeForce revenue in its most critical market, China, came from sales to crypto-miners."[30]

Petitioners attempt to downplay this specificity about market share by arguing that Respondents don't offer specifics on when Huang actually saw this data, even though the Complaint alleges that the data was reflected throughout the entirety of 2017.[31] And, it was during 2017 that the CEO told investors, specifically in response to questions about crypto demand, that he knew "every single move" related to crypto demand,[32] and described that demand as "small but not zero."[33] It was also during 2017 that the company produced a video showing the CEO actually reviewing the sales data. It's hard to imagine what more could be alleged here without possession of the relevant documents and databases, and/or testimony from the CEO himself – none of which is available to Respondents at the pleading stage. Scienter must be "strongly inferred" at this stage, not demonstrated to be more likely than not.

---

[30] Compl. ¶¶10, 86.

[31] *Id.*

[32] *Id.* ¶66.

[33] *Id.*

This strong inference may arise through numerous types of evidence. A defendant may, for example, have affirmatively acknowledged the existence of the data.[34] Courts look to whether allegations show that those making the false statements were "connected" to the information "in a persuasive way."[35] Connections can arise from access to reports or databases containing the conflicting data,[36] from "automatic[]" delivery to "the management team,"[37] or from "weekly presentations" to corporate officials."[38] Defendants may also admit to access.[39] Connections can also be supported

---

[34] *Reese v. Malone*, 747 F.3d 557, 572, 577 (9th Cir. 2014) ("[t]he inference that Johnson did not have access to the corrosion data is directly contradicted by the fact that she specifically addressed it in her statement" and her statement, "makes references to specific conditions found in the pipelines, strongly suggests she had access to the disputed information").

[35] *Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent'mt Corp.*, 58 F.4th 195, 216 (5th Cir. 2023).

[36] *See Okla. Police Pension & Ret. Sys. v. LifeLock, Inc.*, 780 F. App'x 480, 484 n.5 (9th Cir. 2019) (finding a witness's assertions that the witness's supervisor and the defendant met regularly to discuss reports prepared by the witness sufficient to establish, at the pleading phase, that the defendant had access to the information in the reports).

[37] *In re Quality Sys., Inc. Sec. Litig.,* 865 F.3d 1130, 1145 (9th Cir. 2017).

[38] *Six Flags*, 58 F.4th at 216 ("Here, FE1's reports are described as 'weekly presentations' containing details about the lack of infrastructure, lack of construction workers onsite, and lack of progress over 'x number of days' in specific sectors of the parks.").

[39] *Glazer Capital Mgmt. LP v. Forescout Tech., Inc.*, 63 F.4th 747, 772-73 (9th Cir. 2023) (defendant alleged to have "publicly stated, 'Clari [a revenue platform used to track deals] provides new visibility into the sales execution process that is unparalleled.'"). *See also Quality Sys.*, 865 F.3d at 1145 (company's

by the defendant's position within the company[40] and her management style.[41] Allegations of scienter may also be supported by the importance of the matter to the company or investors. [42]

Each of these issues may be considered along a sliding scale of significance. For example, a court may analyze the level of investor interest, management style, and connections to data, weighing the strengths

---

"executives themselves told investors they had real-time access to, and knowledge of, sales information").

[40] *Wolfe v. Aspenbio Pharma, Inc.*, 587 Fed. Appx. 493 (10th Cir. 2014) ("Although 'standing alone, the fact that a defendant was a senior executive in a company cannot give rise to a strong inference of scienter,'" … the position of CEO "is nonetheless 'a fact relevant in our weighing of the totality of the allegations.' ") (citations omitted). *See also Institutional Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009) (position as CFO a factor in determining strong inference of scienter).

[41] *See Ind. Pub. Ret. Sys. v. PluralSight, Inc.*, 45 F.4th 1236, 1260 (10th Cir. 2022) (supporting connection when officer stated that "he closely monitored" sales numbers); *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1234 (9th Cir. 2004) ("It is reasonable to infer that Oracle executives' detail-oriented management style led them to become aware of the allegedly improper revenue recognition of such significant magnitude that the company would have missed its quarterly earnings projections but for the adjustments."); *see also City of Taylor Gen. Emps. Ret. Sys. v. Astec Indus., Inc.*, 29 F.4th 802, 813 (6th Cir. 2022) ("Plaintiffs' allegations show that Brock was intimately aware of what was occurring at the plants.").

[42] *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008); *see also Reese*, 747 F.3d at 575 ("Although some of the circumstantial evidence supporting scienter is not directly linked to Johnson in the complaint, we can impute scienter based on the inference that key officers have knowledge of the 'core operations' of the company."); *PluralSight*, 45 F.4th at 1260, 1264 (officer knew "sales force capacity" was important to investors and stock price).

and weaknesses in each category in terms of their probity regarding scienter – though always with an eye toward the overarching story the complaint is trying to tell. This holistic approach allows courts the flexibility to consider (and accept or reject) all relevant information, and weigh it collectively as logic would dictate. The holistic approach is the right one; categorical rules should once again be rejected.

C. No plausible counter-inference has been proffered, let alone one that outweighs the inference raised by Respondents' allegations.

Petitioners argue that a stronger inference from the facts alleged is that NVIDIA created the Crypto SKU to meet crypto demand while preserving its GeForce GPUs for gaming. They claim that, in creating this strategy, NVIDIA, at most, innocently "miscalculated" the complexities of crypto-related demand. However, this inference concerns the intent behind the business strategy, not the intent behind statements about whether the strategy was succeeding.

The issue is not whether NVIDIA designed the Crypto SKU to hide true crypto demand in the gaming segment, but rather what they said after internal data showed the strategy was failing. In other words, the alleged falsehood is that Huang misrepresented the extent of crypto demand in the gaming segment, not that he misrepresented the reasons for creating the Crypto SKU. Any competing inference must focus on why Huang might have claimed that crypto-mining demand in the gaming segment was "small but not zero." On this point, Petitioners provide no plausible counter-inference, let alone one that is *more compel-*

ling than the inference flowing from Respondents' allegations.[43]

III. Falsity: This Court Should Not Create a Categorical Rule Excluding the Use of Expert Opinions at the Pleading Stage.

A. Requirements of the PSLRA.

In adopting the PSLRA, Congress did not require a "strong inference" that statements were false or misleading.[44] Unlike standards applicable to scienter, a heightened standard already existed under Federal Rule of Civil Procedure 9(b) to plead falsity with "particularity."[45] Thus, the PSLRA simply added that a complaint "specify" each statement alleged to be misleading and "the reason or reasons why."[46] With these specifics and reasons, courts can assess the "coherence and plausibility of the facts when considered together"[47] in determining whether a reasonable investor would find them misleading.[48] Congress, in adopting the PSLRA,

---

[43] *See Tellabs*, 551 U.S. at 324.

[44] *Glazer Capital Mgmt.*, 63 F.4th at 766 ("To be abundantly clear, … we do not impute the strong inference standard of scienter to the element of falsity; we do not require a 'strong inference of fraud.' Falsity is subject to a particularity requirement and the *reasonable inference* standard of plausibility set out in *Twombly* and *Iqbal*, and scienter is subject to a particularity requirement and a *strong inference* standard of plausibility.").

[45] *See Tellabs*, 551 U.S. at 319 (noting that at the time of the adoption of the PSLRA, Rule 9(b) provided that state of mind requirement could be "averred generally").

[46] 15 U.S.C. §78u-4(b)(1).

[47] *PluralSight*, 45 F.4th at 1248.

[48] *See Boykin v. K12, Inc.*, 54 F.4th 175, 185 (4th Cir. 2022) ("The falsity element of a Rule 10b-5 claim boils down to "the reasonable investor's view."). *See also Glazer Capital Mgmt.*,

did not alter or limit *the types of information* that could be included as "reasons" for alleging falsity, whether that information comes from media sources, independent analyst reports, academic articles or analysis, or plaintiffs' own calculations. Congress only required that the basis upon which plaintiffs allege falsity be specified.

Again, this approach allows courts flexibility in reviewing what is specified in a complaint and carefully gauging the plausibility (or lack thereof) of the allegations. This approach is sensible and does not impose arbitrary restrictions that would necessarily be both under- and over-inclusive. Nothing in the PSLRA supports the categorical exclusion of expert analysis at the pleading stage, and this Court should decline to read into the PSLRA a prohibition on the use of experts, market data, or market research to support allegations that a statement is false or misleading.

B. The value of allegations informed by expert analysis is, and should remain, based on their plausibility.

Conclusory allegations akin to "the disclosure was false," whether from an expert or from plaintiffs, are insufficient. However, it flies in the face of common sense (and existing case law) to strike an analysis

---

63 F.4th at 764 ("In determining whether a statement is misleading, the court applies the objective standard of a 'reasonable investor.'"); *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund*, 845 F.3d 1268, 1275 (9th Cir. 2017) ("[A] statement is misleading if it would give a reasonable investor the 'impression of a state of affairs that differs in a material way from the one that actually exists.'") (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008)).

because it was performed by an expert when it is undisputed that the court could consider the same analysis if it was performed directly by plaintiffs. The relevant question under the PSLRA and accompanying case law is not who did the analysis, but how much weight the analysis should be afforded based on the information provided. And while expert analyses are not required to support allegations of fraud, they can be used to assist courts in understanding the false or misleading nature of statements.[49] The value and strength of allegations based on expert analysis simply depends on their particularity and plausibility.

One *amicus*, however, goes so far as to advocate for a new rule that categorically disallows information from an expert at the pleading stage because experts, by definition, offer "opinions."[50] This argument is unsupported by case law or even by Petitioners, who concede that an expert may be used at the pleading stage.[51] Moreover, it elides the true nature of the analysis Prysm did, which was to provide an *estimate* based on numerous data points using transparent

---

[49] *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 175-76 (2d Cir. 2019) (expert assertions relating to whether studies of survival rates were "major"); *Reese*, 747 F.3d at 569 ("Plaintiffs also reference a detailed report of their expert, Dr. Smart, who opined that a corrosion rate of 32 MPY was 'high' and 'not manageable.'"). In fact, Petitioners agree that an expert opinion can be used to "bolster" allegations that a statement is misleading. *See* Cert. Pet. 5.

[50] Grundfest Ct. App. Br. 20-22 (arguing that the entire case should be dismissed solely on the basis that the Prysm report reflects "an opinion not a fact" and that the "Prysm Report's status as an opinion, not as a fact, is compelled by Federal Rule of Evidence 702").

[51] *See* Pet. Br. 48 ("None of this is to say that expert opinions are categorically forbidden at the pleading stage.").

reasoning that may be assessed for plausibility. Under the logic this *amicus* advocates, a court might not even accept an allegation drawn directly from a line item in a company's financial statements, given that Generally Accepted Accounting Principles often require the use of estimates performed by experts (accountants).[52]

C. Barring allegations derived from expert analysis because they rely on "market data" is inconsistent with how capital markets function.

Petitioners also appear to seek a rule that would disqualify expert analysis that is "not based on any internal [] sales or revenue documents" and relies on what Petitioners repeatedly refer to as "generic market data."[53] Reliance on market data, however, has long been a cornerstone of analysis in securities fraud cases because publicly available market data is at the heart of how capital markets operate. Investors routinely rely on publicly available market infor-

---

[52] *See, e.g.*, Donald Resseguie, *Applying GAAP and GAAS* § 28.06 (2024) (noting that "process of preparing the financial statements in accordance with GAAP involves making many estimates of future events," including "useful lives and salvage values of depreciable assets, uncollectible accounts, warranty costs, actuarial numbers involved in accounting for pension plans, net realizable value for inventory, and values needed to classify lease agreements").

[53] Note, however, that (as with all types of market research), some of the information used in the Prysm analysis was derived from NVIDIA, such as for example, the cost of the GeForce GPUs. Compl. ¶147 ("The data employed in [Prysm's] analysis was derived from NVIDIA's own financial statements and internal documents, independent financial analysts, and third-party data sources recognized as credible . . . .").

mation to make investment decisions and assess the accuracy of public statements. Indeed, courts accept as corrective disclosures reports by analysts and other market participants that rely on public information to show market awareness of the false or misleading nature of a company's statement.[54] Barring such data as somehow unpersuasive because it doesn't come from a specific internal document is inconsistent with the "reasonable investor" standard for assessing falsity.[55]

An expert's use of market data, analysis, and research does not mean that potential plaintiffs can easily circumvent the PSLRA's requirements by simply hiring an expert. Defendants may always contest the particularity or plausibility of this type of information, as Petitioners did (unsuccessfully) in the case below.[56] When information is included in a complaint, defendants can challenge the

---

[54] *See, e.g.*, *Turner Ins. Agency, Inc. v. Farmland Partners Inc.*, No. 18-cv-02104-DME-NYW, 2019 WL 2521834, at *23 (D. Colo. June 18, 2019) (finding corrective disclosure by an analyst report relying on public information); *In re Winstar Commc'ns*, No. 01-cv-3014 (GBD), 2006 WL 473885, at *15 (S.D.N.Y. Feb. 27, 2006) (plaintiffs sufficiently pleaded corrective disclosure based on a short-seller report, even when the "findings in those reports are not attributed to any non-public information"); *Bishins v. Cleanspark, Inc*., No. 21-CV-511 (LAP), 2023 WL 112558, at *37 (S.D.N.Y. Jan. 5, 2023) (same).

[55] *See Glazer Capital Mgmt.*, 63 F.4th at 764 ("In determining whether a statement is misleading, the court applies the objective standard of a 'reasonable investor.'").

[56] *E. Ohman J:or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918, 930 (9th Cir. 2023) (disagreeing with defendants' contention that the Prysm analysis was not reliable given the "detailed analysis" by "knowledgeable and competent professionals").

assumptions,[57] methodology,[58] and facts used in presenting the information.[59] Reliance on poor reasoning, or assumptions that are insufficiently explained, can cause a court to substantially discount or even entirely disregard the data.[60] But market information, analyzed by experts or others, can (and should continue to) constitute a "reason" why a statement is plausibly false or misleading.

CONCLUSION

Arguments that amount to a requirement that potential plaintiffs have possession of internal company documents to support scienter or that would

---

[57] *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 837 (9th Cir. 2022) (statistical analysis by an expert insufficient to show falsity where complaint "provided no plausible justification for the assumptions underlying how this expert precisely derived that 5.55-fold estimate").

[58] *Hershewe v. JOYY Inc.*, 2023 WL 3316328, at *1 (9th Cir. May 9, 2023) ("[T]he Muddy Waters Report fails to detail how it determined that various IP addresses of alleged fake users or bots are associated with JOYY.").

[59] *Ark. Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) ("Although it is permissible for a plaintiff to bolster a complaint by including a nonconclusory opinion to which an expert may potentially testify, "opinions cannot substitute for facts under the PSLRA."); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) ("Accordingly, Dr. Blum's opinion cannot rescue the Investors' claims, unless that opinion was based on particularized facts sufficient to state a claim for fraud. But the only facts on which Dr. Blum relied, according to the Complaint, are those already considered above and ruled insufficient.").

[60] *See Nektar Therapeutics,* 34 F.4th at 836 (discounting the selective use of data from a report issued by an anonymous short-seller; "cherry-picking data from only three patients does not plausibly show the falsity of the 30-fold claim").

categorically exclude expert analysis in the pleadings as a basis to allege falsity, present legally unsupported, unrealistic and ill-advised bars at the pleading stage. Moreover, contrary to what Congress intended, the categorical rules sought by Petitioners would make meritorious actions more difficult to bring. The holistic analysis this Court required in *Tellabs* allows greater precision in separating meritorious from non-meritorious claims. This approach should be retained.

Respectfully submitted,

DANIEL P. CHIPLOCK
MICHAEL J. MIARMI
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500
dchiplock@lchb.com
mmiarmi@lchb.com

SAMUEL H. RUDMAN
Counsel of Record
ROBBINS GELLER RUDMAN & DOWD LLP
58 South Service Road
Suite 200
Melville, NY 11747
(631) 367-7100
srudman@rgrdlaw.com

Counsel for Amici Curiae

October 2, 2024