No. 23-970

IN THE

Supreme Court of the United States

NVIDIA CORP. and JENSEN HUANG,

Petitioners,

v.

E. OHMAN J:OR FONDER AB and STICHTING PENSIOENFONDS PGB,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL RETAIL FEDERATION, AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

raise issues of concern to the nation's business community.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit's decision permits securities-fraud plaintiffs to circumvent the Private Securities Litigation Reform Act (PSLRA) by substituting *post hoc* expert speculation for particularized factual allegations of falsity and scienter. That decision allows plaintiffs to satisfy the PSLRA's heightened pleading standard by advancing securities-fraud theories based on nothing more than purported expert opinions and speculation about the contents of internal company documents. *See* Pet. Br. 21-22. If the Court upholds this distortion of the PSLRA's requirements, plaintiffs will flood the courts armed solely with hired-gun experts offering little more than after-the-fact guesswork about what defendants' data "would have" shown. Pet. App. 42a, 55a.

Congress enacted the PSLRA's heightened pleading standard in response to "significant evidence of abuse in private securities lawsuits." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). This pleading standard requires plaintiffs to "specify," among other things, "each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1)(B). Affirming the Ninth Circuit's holdings on falsity and scienter would erode the PSLRA's stringent pleading requirements

and thereby thwart Congress's abuse-preventing aims. This is so for two principal reasons:

First, in holding that Plaintiffs met their burden of pleading falsity, the Ninth Circuit relied largely on an "expert analysis" conducted by a third-party firm that Plaintiffs retained for this litigation. Although the firm purported to offer expert conclusions about NVIDIA's cryptocurrency-related sales, its *post hoc* "estimates" in fact focused on generic market data about worldwide cryptocurrency activities. *See* Pet. App. 20a-23a. The firm then claimed to tie that generic market data to NVIDIA's sales only through a series of unexplained and unreliable assumptions, to then conjecture what it believed NVIDIA's sales data "would have" shown. Pet. App. 42a, 55a; *see also* Pet. App. 68a-71a (Sanchez, J., dissenting). As Judge Sanchez explained, the majority "allowed an outside expert to serve as the primary source of falsity allegations under the PSLRA," even though "the expert relie[d] almost exclusively on generic market research and without any personal knowledge of the facts on which [its] opinion is based." Pet. App. 69a (Sanchez, J., dissenting).

Second, in holding that Plaintiffs met their burden of pleading scienter for NVIDIA's CEO, the Ninth Circuit relied on statements by anonymous former employees alleging that NVIDIA maintained internal reports that the CEO could access and monitor. Pet. App. 35a-43a. But because Plaintiffs failed to allege that the CEO ever reviewed (or would have had reason to review) those documents, the Ninth Circuit simply assumed that the CEO "would have" reviewed those documents, which in turn "would have" shown

what Plaintiffs' expert surmised. Pet. App. 42a, 55a. So on scienter, as with falsity, the Ninth Circuit's holding hinged on the expert's opinion.

In these ways, the Ninth Circuit's decision provides a roadmap for future securities-fraud plaintiffs to survive motions to dismiss even when they lack particularized factual allegations that the defendants made any false statements or knew of internal company documents that were at odds with what they told the market. An expert specially hired for litigation can almost always manipulate inputs and assumptions to manufacture findings that reinforce plaintiffs' desired theories of fraud. And because courts may not rigorously examine an expert's methods at the pleading stage, the Ninth Circuit's approach enables plaintiffs to defy the PSLRA's exacting pleading standards by relying on an expert to "substitute for facts." *Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 354 (2d Cir. 2022) (quotation marks omitted).

These departures from the PSLRA make the Ninth Circuit an outlier. Other courts across the country have regularly confronted these pleading stratagems, and properly rejected attempts to satisfy the pleading standard by relying principally on bare expert opinions and other speculation in lieu of particularized factual allegations demonstrating falsity and scienter. If this Court rejects the majority view and adopts the Ninth Circuit's position, nothing will stop plaintiffs from using the same abusive litigation tactics that first prompted Congress to enact the PSLRA's heightened pleading standard.

Finally, in failing to adhere to the PSLRA pleading standard, the Ninth Circuit's approach imposes immense costs on public companies. Even meritless securities class actions that survive dismissal create significant pressure on defendants to settle, in large part due to the exorbitant costs of discovery and the threat of massive class-action judgments should the lawsuits proceed to trial. Such settlements total billions of dollars each year and affect broad swaths of the economy, without any indication that those staggering figures are linked to meritorious claims. By weakening the pleading standard plaintiffs must overcome to push cases to the discovery phase, contrary to what Congress intended, the Ninth Circuit's decision threatens to drive up these costs even more.

This Court should reverse.

ARGUMENT

I. Affirming Would Erode The PSLRA's Pleading Standard By Allowing Litigation-Driven Expert Opinions To Substitute For Particularized Factual Allegations.

For decades, the PSLRA has helped stem baseless securities-fraud lawsuits by imposing a stringent standard for pleading fraud with particularity. If affirmed, the Ninth Circuit's approach would lay out a simple path for securities-fraud plaintiffs to circumvent the PSLRA's heightened pleading standard by relying on a purported expert's made-for-litigation opinions to substitute for particularized factual allegations of fraud. Under the Ninth Circuit's reasoning,

plaintiffs can survive motions to dismiss by hiring experts that manipulate generic market analysis to bolster hindsight-driven fraud theories, all without grounding their opinions in facts or data about the company. Expert "analysis" of this sort is not an adequate replacement for the particularized factual allegations of fraud the PSLRA demands.

A. The PSLRA imposes exacting requirements on the use of experts to plead fraud.

Congress enacted the PSLRA "[a]s a check against abusive litigation by private parties" that "impos[ed] substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Among the "perceived abuses" were "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers.'" *Merrill Lynch*, 547 U.S. at 81 (quoting H.R. Rep. No. 104-369, at 31); *see also Tellabs*, 551 U.S. at 320.

Before the PSLRA, private securities litigation was marked by "'the routine filing of lawsuits'" alleging securities fraud "'with only [a] faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting H.R. Rep. No. 104-369, at 31); *see also, e.g.*, *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 362 (5th Cir. 2004) (Congress enacted the PSLRA in part to prevent securities plaintiffs from filing "baseless claims and

then attempting to discover unknown wrongs" (quotation marks omitted)). Such suits would crop up "whenever there [was] a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Rep. No. 104-369, at 31-32. In such "abusive and manipulative securities litigation, innocent parties [were] often forced to pay exorbitant 'settlements,'" *id.* at 32, even when the litigation was meritless. *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (Congress, in enacting the PSLRA, "[r]ecogniz[ed] the 'concern over the use of then-existing class action procedures to bring strike suits in order to exact extortionate settlements'" (quoting Thomas Lee Hazen, Law of Securities Regulation § 12.15[1] (6th ed. 2009))). Congress enacted the PSLRA to "put an end to th[is] practice of pleading fraud by hindsight." *Elam v. Neidorff*, 544 F.3d 921, 927 (8th Cir. 2008) (quotation marks omitted).

As part of the "control measures" to "curb frivolous, lawyer-driven litigation," the PSLRA imposed "[e]xacting pleading requirements." *Tellabs*, 551 U.S. at 313, 322. Under these "heightened pleading instructions," *id.* at 321, securities-fraud plaintiffs must "*state with particularity all facts*" on which they predicate their belief that the challenged statement is false. 15 U.S.C. § 78u-4(b)(1)(B) (emphasis added); *see also* Fed. R. Civ. P. 9(b) (requiring "the circumstances constituting fraud" to be "state[d] with particularity" in pleadings). This particularity requirement extends to the scienter element of a securities-fraud claim. *See Tellabs*, 551 U.S. at 313 (heightened pleading standard requires plaintiffs to "state with particularity both the facts constituting the alleged violation, and

the facts evidencing scienter"). And with respect to scienter, the PSLRA further requires a complaint to "state 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) (emphasis added); *see also Tellabs*, 551 U.S. at 314 (a "strong inference" "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent"); *Merrill Lynch*, 547 U.S. at 81. By imposing these heightened standards, the PSLRA aimed to "prevent[] a plaintiff from using vague or general allegations in order to get by a motion to dismiss for failure to state a claim." *Tellabs*, 551 U.S. at 334 (Alito, J., concurring).

The PSLRA's "exacting pleading requirement[s]," *id.* at 313 (majority opinion), naturally carry implications for the use of expert opinions in alleging the elements of securities fraud, including falsity and scienter. The statute contains no special carveout for expert opinions when it requires private securities-fraud complaints to "set forth the facts 'on which [a] belief' that a statement is misleading was 'formed.'" *Dura*, 544 U.S. at 345 (quoting 15 U.S.C. § 78u-4(b)(1)); *see also, e.g.*, *Merrill Lynch*, 547 U.S. at 82 (same); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) ("PSLRA complaints must allege *specific facts* demonstrating material misstatements made with scienter." (emphasis added)). And experts' "opinions," of course, do not qualify as "facts." *See* Pet. Br. 42-43.

That is why multiple courts of appeals have held that securities-fraud complaints relying on expert

witnesses must have a basis in actual facts about the company, rather than merely present speculative, hindsight-driven opinions. *See, e.g.*, *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354 (expert "opinions cannot substitute for facts under the PSLRA" and "cannot rescue" falsity allegations "unless [they were] based on particularized facts sufficient to state a claim for fraud" (quotation marks omitted)); *Blackwell*, 440 F.3d at 286 (expert "opinions cannot substitute for facts under the PSLRA"). Indeed, "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced . . . after the action has been filed." *Medhekar v. U.S. Dist. Ct.*, 99 F.3d 325, 328 (9th Cir. 1996); *see also* 15 U.S.C. § 78u-4(b)(3)(B) (PSLRA provision imposing automatic stay of "all discovery and other proceedings" when a defendant files a motion to dismiss).

The PSLRA thus mandates that when plaintiffs rely primarily on expert opinions to allege securities fraud, they must provide sufficiently particularized allegations that the experts based their opinions on the company's actual information or otherwise identify specific data about the company that would corroborate the expert's conclusions. *See also* Pet. Br. 32 ("[a]llegations about the contents of internal documents are critically important to the . . . analysis required by *Tellabs*"). In other words, a plaintiff invoking expert opinions to plead securities fraud must explain how that expert possesses, has access to, or otherwise has a reliable basis to opine on the company's actual information. Even before the PSLRA was enacted, the Rule 9(b) particularity requirement

mandated that averments of fraud specify the "'who, what, when, where, and how.'" 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1297 (4th ed.) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (Easterbrook, J.)). And in enacting the PSLRA, Congress expressly insisted that securities-fraud complaints "set forth the facts 'on which [a] belief' that a statement is misleading was 'formed.'" *Dura*, 544 U.S. at 345 (quoting 15 U.S.C. § 78u-4(b)(1)). Conjecture about what the company's documents "would have" shown based on generic market data, Pet. App. 42a, 55a, is no substitute.

B. Affirming would create a roadmap for further expert-based circumvention of the PSLRA.

Contrary to the PSLRA's clear dictates, the Ninth Circuit crafted a new standard that will allow securities-fraud plaintiffs to satisfy their pleading burden by retaining experts who merely hypothesize information about company data *post hoc*, based on generic market research, instead of grounding their analysis on facts about what the actual company data showed. If affirmed, the Ninth Circuit's approach would weaken the PSLRA's heightened pleading standard in at least two critical ways.

First, the Ninth Circuit ignored whether the expert in question had access to the company's data or could otherwise speak to what facts were known by the company and its employees. The majority found it sufficient that the expert opinion (prepared by Prysm, a third-party firm Plaintiffs hired for this litigation)

was authored by "knowledgeable and competent professionals" who described their "methodology." Pet. App. 20a (reciting the "detailed analysis" that Prysm took to approximate NVIDIA's cryptocurrency-driven gaming revenues). But even assuming that the complaint adequately explains the basis and reasons for Prysm's opinion, *cf.* Fed. R. Civ. P. 26(a)(2)(B), more would be needed for the opinion to carry Plaintiffs' pleading burden under the PSLRA. As Judge Sanchez's dissent explained, the expert opinion here "relies on a series of assumptions drawn from generic market research," rather than "information provided by any current or former NVIDIA employee or any internal report or data source." Pet. App. 70a.

Making matters worse, Prysm's opinion failed to establish the *reliability* of critical assumptions, including NVIDIA's cryptocurrency market share. Pet. App. 70a-72a. As a result, "the amended complaint does not plead with particularity facts establishing that the [expert was] . . . in a position to know what NVIDIA's own internal revenue reporting showed." Pet. App. 74a (quotation marks omitted). When an expert (like the one here) puts forward only hypotheses about what defendants' data "would have" shown using generic market research, Pet. App. 42a, 55a, the PSLRA's exacting pleading standard demands rigorous analysis of the expert's sources and conclusions, not just a description of the overall method employed.[2]

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[2] The RBC Capital Markets report cited by the Ninth Circuit as supposed corroboration suffers from the same flaws as Plaintiffs' expert opinion. *See* Pet. Br. 50-51.

Second, the Ninth Circuit further diluted the PSLRA's exacting pleading standard by crediting vague confidential-witness allegations marked by the same deficiencies as Prysm's analysis. Certain former employees claimed that NVIDIA's CEO was a "meticulous manager who closely monitored sales data," Pet. App. 42a, but such allegations fail to establish what data NVIDIA's internal records actually contained, let alone identify any specific information that the CEO actually reviewed. And the majority below fared no better in pointing to generic statements by former employees about "crypto miners purchasing GeForce GPUs in high volumes" to corroborate the expert opinion. Pet. App. 45a; *see also, e.g.*, Pet. App. 24a. Those former-employee statements fall short of pleading with particularity facts about NVIDIA's worldwide GeForce revenues during the class period, as would be necessary to prove falsity. *See* Pet. Br. 49-50.

In sum, undifferentiated, broad-brush statements about high sales volumes or large orders "cannot substitute for facts under the PSLRA." *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354; *Blackwell*, 440 F.3d at 286. Much less do the former-employee statements explain how Prysm arrived at its conclusion that NVIDIA misrepresented its cryptocurrency-related sales during the relevant time periods, especially when the statements had to do with different timeframes or were made by employees who never interacted with the CEO.

Both separately and together, these aspects of the Ninth Circuit's holding contravene the PSLRA's pleading standard and give future plaintiffs a

straightforward playbook to survive a motion to dismiss even absent particularized factual allegations. Start with an "expert" analysis produced after the fact for the purpose of litigation, using generic market research and simple estimation techniques, to conclude that a company knowingly misstated financial metrics. Then, for good measure, find some former employees to make vague, indeterminate statements about company information, and label that as supposedly insider proof of the experts' specific conclusions. In short, if plaintiffs' lawyers can procure an expert to produce made-for-litigation opinions based on generic information and with the benefit of hindsight, a PSLRA complaint need not be tethered to company-specific facts giving rise to a claim of fraud.

The Ninth Circuit's standard threatens to scuttle the PSLRA's work, with consequences extending far beyond this case. Entrepreneurial plaintiffs would exploit an opinion by this Court adopting that approach as license to evade the PSLRA's pleading standard through reliance on expert opinions. Whenever there is public disclosure of stock-price declines, in any number of contexts and industries, plaintiffs would need only hire an expert to manufacture fraud allegations by generating estimates and hypotheses based on generic market research—just as Plaintiffs did here. The PSLRA "s[ought] to avoid," not encourage, "'the routine filing of lawsuits'" like this, based on "'only [a] faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Dura*, 544 U.S. at 347 (quoting H.R. Rep. No. 104-369, at 31).

II. The Ninth Circuit's Decision Departs From The Approach Taken By Most Federal Courts.

Since the PSLRA's enactment, plaintiffs have frequently invoked expert opinions to bolster their claims of securities fraud—often with questionable other support for their allegations. That is evidenced in the many decisions rejecting such suits as attempts to substitute *post hoc* expert opinion for the particularized factual allegations required by the PSLRA's heightened pleading standard. Unlike the Ninth Circuit, most courts have recognized that securities-fraud plaintiffs may not rely on expert opinions in lieu of facts to allege fraud. Instead, a complaint must contain sufficiently particularized allegations that an expert opinion is grounded in facts about the defendant—not just hypothesize about what the defendant's data "would have" shown. Pet. App. 42a, 55a. Affirming the Ninth Circuit would bless the inappropriate use of expert-generated speculation.

For years, courts across the country have correctly rejected plaintiffs' attempts to rely on speculative expert reports to bypass the PSLRA's heightened pleading standards. These courts have consistently recognized that, although securities-fraud plaintiffs may sometimes rely on expert opinions to support allegations of falsity or scienter, such expert analyses must stand on something more concrete than generic market data.

Specifically, before the Ninth Circuit's decision, numerous district courts agreed that plaintiffs may not rely on experts to allege fraud when the expert

has no basis for opining about the company's actual information. In *In re Silicon Storage Tech., Inc. Sec. Litig.*, for instance, a California district court held that plaintiffs plainly failed the PSLRA's pleading standard when they invoked a market-research expert's report to support their claim that the defendant shipping companies fraudulently misstated prices and other financial metrics. No. C-05-0295 PJH, 2007 WL 760535, at *30 (N.D. Cal. Mar. 9, 2007). The complaint there alleged that the expert had looked to "generic market data" and the company's public filings to calculate financial metrics that purportedly revealed a significant gap between actual metrics and what the defendant reported at the time. *Id.* at *10-12. The complaint did not, however, claim that the expert "had any specific data on [the company's] prices or costs—just that [the firm] based its conclusions on broad categories of data like 'average selling price.'" *Id.* at *14.

In dismissing the complaint, the court in *Silicon Storage* considered plaintiffs' reliance on the expert such a "serious problem" that it ruled out even the possibility of amendment. *Id.* at *30. The complaint's incurable defect, the court explained, was "plaintiffs' reliance on generic data from [the expert] as the source of their 'facts' regarding the alleged falsity of defendants' statements regarding . . . prices and inventory valuations." *Id.* That approach plainly flunked the PSLRA's pleading standard, *id.* at *30-32, and the court found "no persuasive authority in support of [plaintiffs'] argument that courts have allowed 'expert' opinion in the form of generic market data—without more—as factual support for claims of securities fraud brought under the PSLRA," *id.* at *31.

Similarly, in *Sgarlata v. PayPal Holdings, Inc.*, another California court rejected plaintiffs' reliance on an expert's opinion because the complaint contained "no allegation that [the expert] was familiar with, much less had knowledge of, the specific security architecture of Defendants' privacy network." 409 F. Supp. 3d 846, 860 (N.D. Cal. 2019), *aff'd sub nom. Eckert v. PayPal Holdings, Inc.*, 831 F. App'x 366 (9th Cir. 2020). The expert, moreover, "did not actually talk to employees at [Defendants' companies], nor did he review documents that—in and of themselves—demonstrate inconsistencies." *Id.*

Likewise in *In re Egalet Corp. Sec. Litig.*, a Pennsylvania district court rebuffed plaintiffs' attempt to invoke an expert to plead securities fraud when the expert's opinion purported to demonstrate what the defendants "would have known," yet was "based solely on . . . publicly available information." 340 F. Supp. 3d 479, 511 (E.D. Pa. 2018), *aff'd sub nom. Spizzirri v. Zyla Life Scis.*, 802 F. App'x 738 (3d Cir. 2020). "To the extent" the expert had even "formed an opinion" about "the central issue" in the case, the court found that "the fact that such an opinion [was] based solely on public information substantially undermine[d] [the expert's] conclusion." *Id.* Any inference drawn by the expert from that public information, the court reasoned, "could . . . have been obvious to an investor using public information." *Id.* at 510-11.

Roth v. OfficeMax, Inc. reflects yet another instance where a court correctly applied the pleading standard to bar speculative allegations like those here. 527 F. Supp. 2d 791 (N.D. Ill. 2007). There, the court held that plaintiffs could not "attempt to bolster

their allegations of fraud" through an expert's opinion that the defendant company's senior management "should have been aware" of certain "internal control weaknesses" at the company. *Id.* at 801. In so holding, the court emphasized (among other things) that plaintiffs did "not allege that [the expert] ever worked at [the company] or ha[d] personal knowledge of the inner workings of the [c]ompany," and that "opinions cannot substitute for facts under the PSLRA." *Id.*

In all these cases (and others), courts considered it dispositive that the plaintiffs failed to "state with particularity" how the experts they relied on to allege fraud could satisfy the PSLRA's exacting pleading requirement. *Tellabs*, 551 U.S. at 313.[3] The Ninth Circuit's decision, by contrast, embraces a different rule—one that disregards the PSLRA by permitting fraud to be pleaded based on expert speculation. As explained below, this erosion of the PSLRA's exacting pleading requirements, if affirmed, could have serious adverse consequences for public companies and investors.

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[3] *See also, e.g.*, *Arkansas Pub. Emps. Ret. Sys.*, 28 F.4th at 354; *Blackwell*, 440 F.3d at 286; *City of Atlanta Police Officers' Pension Plan v. Celsius Holdings, Inc.*, No. 22-80418-CV-DMM, 2023 WL 1998174, at *10 (S.D. Fla. Feb. 13, 2023), *report and recommendation adopted*, No. 22-80418-CV, 2023 WL 2601816 (S.D. Fla. Mar. 22, 2023); *In re Under Armour Sec. Litig.*, 409 F. Supp. 3d 446, 454-55 (D. Md. 2019); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, No. 5:11-CV-04003-LHK, 2013 WL 2156358, at *6-7 (N.D. Cal. May 17, 2013); *In re OmniVision Techs., Inc. Sec. Litig.*, 937 F. Supp. 2d 1090, 1107 (N.D. Cal. 2013); *In re Textainer P'ship Sec. Litig.*, No. C-05-0969 MMC, 2006 WL 1328851, at *5 (N.D. Cal. May 15, 2006).

III. Affirming The Ninth Circuit's Decision Would Exacerbate The Significant Social Costs Inflicted By Abusive Securities Litigation.

As Congress recognized in enacting the PSLRA, securities lawsuits often impose massive discovery and litigation costs that dwarf any countervailing benefits. These costs place substantial pressure on defendants to settle before discovery, regardless of the merits of the underlying claims. Allowing courts to effectively ignore the PSLRA's heightened pleading standard, whenever plaintiffs can come up with hired experts to bypass it, would amplify the incentives for plaintiffs' attorneys to file baseless class actions with the aim of extracting sizeable settlements. By doing just that, the Ninth Circuit's decision undermines Congress's efforts to forestall abusive litigation and its attendant consequences.

In private securities litigation, discovery expenses and obligations fall asymmetrically on the defendant companies who possess the bulk of the relevant information. *See* Michael A. Perino, Securities Litigation After the Reform Act 4013 (2006). That dynamic is particularly significant for securities class actions like the one here because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). "Settling even nuisance litigation allows a company to avoid such costs." Stephen J. Choi, *The Evidence on Securities Class Actions*, 57

Vand. L. Rev. 1465, 1469 (2004). Enterprising plaintiffs' lawyers thus have strong incentives to push securities litigation to the discovery stage, regardless of the merits of the claims, "impos[ing] costs so burdensome that it is often economical for the [defendant companies] to settle." H.R. Rep. No. 104-369, at 31; *see also* Neil M. Gorsuch & Paul B. Matey, Settlements in Securities Fraud Class Actions: Improving Investor Protection 2 (Wash. Legal Found. 2005), https://perma.cc/2SPK-NVNT ("Today, economic incentives unique to securities litigation encourage class action lawyers to bring meritless claims and prompt corporate defendants to pay dearly to settle such claims.").[4]

Concerns about coercive discovery tactics and high settlement pressures are precisely what prompted Congress to enact a heightened pleading standard in the PSLRA. *Supra* 7-10; *see, e.g.*, *Merrill Lynch*, 547 U.S. at 81 (PSLRA responded to reports of "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent'" (quoting H.R. Rep. No. 104-369,

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[4] *See also, e.g.*, U.S. Chamber Inst. for Legal Reform, Frequent Filers Revisited: Professional Plaintiffs in Securities Class Actions 11 (2022), https://perma.cc/BE9L-HNQJ ("[P]laintiffs' firms can file marginal or even frivolous cases, knowing that the defendants will likely offer a nuisance settlement (and attorneys' fees) to make the cases go away."); Choi, *supra*, at 1466-67 (citing scholarship recognizing that "plaintiffs' attorneys have a strong incentive to file frivolous complaints" in securities lawsuits "to extract a positive settlement from defendants unwilling to go to trial").

at 31)). Indeed, such problems had plagued private securities litigation for decades. This Court's decisions have long reflected "widespread recognition" that such litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). As the Court observed, "[t]he potential for possible abuse of . . . liberal discovery provisions" may "exist in this type of case to a greater extent than . . . in other litigation." *Id.* at 741. Similarly, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Id.* at 740.

The upshot is that these suits, if they survive dismissal too readily, may "permit[] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." *Id.* at 741. That, of course, "is a social cost rather than a benefit." *Id.*

Even with the PSLRA in place, these dynamics have continued. Given the "hydraulic pressure on defendants to settle," *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001), it is unsurprising that defendants facing securities class actions are vastly more likely to settle

those cases than face the risks of trial, *see* Cornerstone Research, Securities Class-Action Filings: 2023 Year in Review 19 (2024), https://perma.cc/3TKF-Q9YW (46% of federal securities class actions filed between 1997 and 2023 settled, compared to 0.4% that made it to trial). Securities class actions thus "have a much higher settlement rate than other types of class actions." S. Rep. No. 104-98, at 6 (1995). And settlements of securities class actions routinely extract billions of dollars each year from defendant companies. *See, e.g.*, NERA, Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review (2024), https://perma.cc/Q88L-R75F (aggregate settlement value of federal securities class actions totaled $3.9 billion in 2023). By one count, such settlements have totaled more than $116 billion since 1996. *See* Stan. L. Sch. Sec. Class Action Clearinghouse, Key Statistics (last visited August 18, 2024), https://perma.cc/ZBU2-4U7P.

Deviations from the PSLRA's pleading standard exacerbate the problem because, as empirical studies have found, oftentimes "the merits do not matter" in a securities class action that survives dismissal. Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 501 (1991). The Ninth Circuit's decision chips away at the careful scrutiny that the PSLRA demands. Affirming that decision would invite persistent plaintiffs' lawyers to employ experts to overcome the pleading hurdle—regardless of the underlying merits—and then exert immense pressure on defendant companies to settle.

Unmeritorious securities actions that nevertheless produce settlement pressure impose costs reverberating beyond the defendant companies. Their harms pass through to the investing public in several ways—most importantly, because such lawsuits often generate substantial stock-price drops. *See* U.S. Chamber Inst. for Legal Reform, Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation 1-2 (2014), https://perma.cc/4QSB-BUH8. And the amounts of such settlements, which are sizeable in their own right, are "relatively minor compared to the overall wealth destroyed by such lawsuits." *Id.* at 30. Studies have estimated that total shareholder loss averages to $39 billion per year, just for an average of $6 billion in settlements per year (before accounting for plaintiffs' attorneys' fees). *Id.* at 3. The pressure on defendants to settle weak securities class actions thus "result[s] in arbitrary wealth redistribution" away from "innocent shareholders." *Id.* at 30; *see also* John C. Coffee Jr., *Reforming the Securities Class Action: On Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1560 (2006) (securities class actions "transfer wealth systematically [away] from 'buy and hold' investors (who bought on average outside the class period)," such as "the small investor who buys and holds for retirement").

Allowing groundless securities lawsuits to clear lax pleading standards, as affirming would do, also hampers the economic competitiveness of domestic industry. Costly securities actions are particularly prevalent (and successful) in the United States, creating excessive litigation risk that undermines global competitiveness. *See, e.g.*, Ctr. for Capital Markets Competitiveness, U.S. Chamber of Commerce, Strength-

ening U.S. Capital Markets: A Challenge for All Americans 12-13 (2008), https://perma.cc/SG9B-G6G5. And no industry is spared. From 1996 to 2007 alone, more than 40% of public companies were hit by a securities class action. *See* Comm'n on the Regul. of the U.S. Cap. Markets in the 21st Century, U.S. Chamber of Commerce, Report and Recommendations 30 (2007), https://perma.cc/H2TD-FTGZ. By some estimates, the average public company in the United States faces a 9% chance of facing at least one securities class action. *See* Gorsuch & Matey, *supra*, at 2-3.

In sum, this Court has long recognized the negative consequences posed by "unduly expansive imposition of civil liability" in private securities litigation. *Blue Chip Stamps*, 421 U.S. at 741. Affirming would "bring about harm of the very sort the [PSLRA] seek[s] to avoid," *Dura*, 544 U.S. at 347: subjecting defendant companies to "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests and manipulation by class action lawyers," *Tellabs*, 551 U.S. at 320 (quotation marks omitted).

CONCLUSION

The Court should reverse.

Respectfully submitted,

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