

No. 24-4909

In The
United States Court of Appeals for the Ninth Circuit

Construction Laborers Pension Trust
of Greater St. Louis, *et al.*,
Plaintiffs-Appellants,

v.

Funko, Inc., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the
Western District of Washington
No. 2:23-cv-00824-JLR (Hon. James L. Robart)

**BRIEF OF *AMICUS CURIAE* CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF FUNKO, INC.'S PETITION
FOR REHEARING AND REHEARING EN BANC**

Janet Galeria
Kevin R. Palmer
U.S. CHAMBER LITIGATION
CENTER
1615 H. St. NW
Washington, DC 20062

Megan Barbero
Courtney L. Dixon
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
(202) 344-4540
mbarbero@venable.com
cldixon@venable.com

Kyle H. Keraga
VENABLE LLP
750 East Pratt St., Suite 900
Baltimore, MD 21202
(410) 244-7650
khkeraga@venable.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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INTEREST OF AMICUS CURIAE¹

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. Many of the Chamber's members are subject to the U.S. securities laws and will be harmed by the panel's errors in this case.

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Private Securities Litigation Reform Act (PSLRA) to curb vexatious securities-fraud class actions. The PSLRA introduced multiple “substantive and procedural controls” to improve the integrity of securities-fraud litigation. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 320-21 (2007). Among them, the statute requires plaintiffs to meet a heightened pleading standard for scienter, 15 U.S.C. § 78u-4(b)(2)(A), giving courts an effective tool to screen meritless litigation at its early stages. It also provides a “[s]afe harbor” for certain forward-looking statements, *id.* § 78u-5(c)(1), ensuring that fear of liability does not deter executives from offering future projections to investors.

The panel decision will undermine the PSLRA’s statutory guardrails, with great cost to businesses, investors, and the economy. In permitting plaintiffs’ securities-fraud lawsuit to move forward, the panel embraced an expansive view of scienter and falsity that is irreconcilable with the text and purpose of the PSLRA and that extends well beyond the approach adopted by any other court of appeals. En banc review is necessary to correct these errors and align this Court’s precedent with the text of the statute and the decisions of its sister Circuits.

First, the panel’s scienter holding creates an end-run around the PSLRA’s heightened pleading requirement and degrades a critical firewall against abusive litigation. Rather than requiring plaintiffs to plead “with particularity” facts that give rise to a “strong inference” of scienter, 15 U.S.C. § 78u-4(b)(2)(A), the panel allowed plaintiffs’ claims to proceed based only on the inference that the subject of the suit is vital to Funko’s “core operations” and executives therefore “must have known” about it. A43. But open-ended judicial assumptions cannot replace the particularized allegations required by law. Because the core operations doctrine cannot be reconciled with the PSLRA’s text, other Circuits have refused to find scienter based on a “core operations” inference standing alone. And the panel’s approach here goes beyond even prior precedents of this Court, risking an ever-expanding loophole to the PSLRA’s requirements.

Second, the panel’s falsity holding rests on a misunderstanding of SEC-mandated risk disclosures and is unworkable. The panel held that Funko’s accurate statements about future risk created a false impression about present circumstances because the panel believed the warned-of “risks” had already “materialized.” A30-35. But risk disclosures are inherently forward-looking. They are intended to inform investors about

what risks may cause harm to the company in the future; they do not inform investors of present or past circumstances. For this reason, the Sixth Circuit has rejected the theory of falsity recognized by the panel here. And although other Circuits have relied on a “materialization-of-risk” standard in certain cases, the panel adopted an even more amorphous view that opens the courthouse doors to hindsight-based risk-disclosure claims.

Left uncorrected, the panel’s errors invite precisely the sort of abusive securities litigation the PSLRA was enacted to guard against.

ARGUMENT

I. The Panel’s Expansive Application of the “Core Operations Doctrine” Is Incompatible with the PSLRA’s Text and Undermines its Purpose.

The panel held that plaintiffs had adequately alleged scienter based not on particularized allegations but only on the “core operations doctrine”—a “scienter theory that infers that facts critical to a business’s core operations or an important transaction are known to a company’s key officers.” A42-43 (quoting *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) (cleaned up)). That holding is incompatible with the PSLRA’s heightened pleading requirement and contrary to

other Circuits’ decisions. Indeed, the panel’s use of the core operations theory here to replace particularized allegations extends this Court’s prior articulation of the doctrine, which was already in tension with other Circuits. And it threatens to create a loophole that will lower the statutory pleading requirements and open the floodgates to meritless securities claims.

The PSLRA requires plaintiffs to plead “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). That “exacting” pleading standard “has teeth.” *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 414 (9th Cir. 2020) (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009)). It requires “that the strong inference of scienter be supported by *facts*,” not the “stacking [of] inference upon inference” to establish state of mind. *Maguire Fin., LP v. PowerSecure Int’l, Inc.*, 876 F.3d 541, 548 (4th Cir. 2017) (emphasis added). But that is precisely what the core operations doctrine allows. It permits plaintiffs and the courts to make freewheeling inferences about what executives “must have known” about a company’s operations, A43, and then infer from *those* inferences that defendants acted with scienter. *Cf. Maguire*, 876 F.3d at 548

(rejecting invitation to infer that defendant “knew his statement was false” and to “*infer from that inference* that” he “acted with scienter”). That cannot be reconciled with the PSLRA’s text.

The panel’s atextual approach also undermines the PSLRA’s objectives. Congress enacted the PSLRA to curb rampant “strike suits” in which plaintiffs filed securities-fraud claims against companies following a drop in stock value, seeking to leverage market pressure “to exact large settlement recoveries.” *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000). Heavy litigation costs and discovery burdens forced companies to settle even claims of “dubious merit” for exorbitant sums. *See id.*; accord H.R. Rep. No. 104-369, at 31 (1995) (observing “the routine filing of lawsuits against issuers of securities . . . without regard to any underlying culpability of the issuer”). The PSLRA “unequivocally raise[d] the bar for pleading scienter” to deter such lawsuits. *Tellabs, Inc.*, 551 U.S. at 321. But the core operations doctrine invites courts to handwave that pleading requirement on the theory that the subject-matter of the suit is sufficiently important that executives must have known about it. And because there are no clear standards defining “core operations,” the doctrine creates an ever-widening exception to an important statutory guardrail.

Other Circuits have therefore recognized that the “core operations” inference can play—at most—a supportive role in establishing inferences of scienter when presented alongside particularized facts. *See, e.g., KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601, 612 (4th Cir. 2021); *Metzler Asset Mgmt. GmbH v. Kingsley*, 928 F.3d 151, 165 (1st Cir. 2019); *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 247 (3d Cir. 2013); *Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.*, 58 F.4th 195, 219 (5th Cir. 2023); *Meitav Dash Provident Funds & Pension Ltd. v. Spirit AeroSystems Holdings, Inc.*, 79 F.4th 1209, 1217-22 (10th Cir. 2023); *see also Frederick v. Mechel OAO*, 475 F. App’x 353, 356 (2d Cir. 2012) (finding it unclear “whether, and in what form, the ‘core operations’ doctrine survives as a viable theory of scienter”).

This Circuit has charted a different course, allowing securities fraud claims to proceed based on the core operations doctrine alone without particularized allegations of scienter. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d at 1063. But before the panel’s decision, this Court had held that plaintiffs could “rely on the core operations inference without particularized allegations” only in “exceedingly rare” situations, *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 n.3 (9th Cir. 2008), where

“it would be absurd” to argue executives were unaware of the facts, *Prodanova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1111 (9th Cir. 2021) (quoting *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1062 (9th Cir. 2014)). Because “‘absurdity’ is a very high bar,” district courts in this Circuit have rejected claims resting entirely on the “core operations” inference. *Bajjuri v. Raytheon Tech. Corp.*, 641 F. Supp. 3d 735, 765 (D. Ariz. 2022) (defrauding of defendant’s “biggest and most important customer”); *Okla. Firefighters Pension & Ret. Sys. v. IXIA*, 50 F. Supp. 3d 1328, 1333, 1360-62 (C.D. Cal. 2014) (use of deferred revenue statements to create “steady growth” narrative); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1068-69 (N.D. Cal. 2012) (adoption of “unattainable” projections).

The panel’s holding goes farther still. It reasoned that Funko faced “inventory management” and “information technology” concerns that executives “must have known” about. A43. But it is far from clear how those circumstances are “exceedingly rare.” *South Ferry*, 542 F.3d at 785 n.3. Companies frequently confront circumstances in which they are attempting to move facilities, integrate new software, or update how inventory is managed. Any number of such operational details could be deemed

“critical” to a company’s success, and the panel’s holding risks opening the door to claims based on vague, unfounded allegations about what must be important to a company’s executives. A46. The panel’s sweeping scienter holding underscores that this Court’s approach to the “core operations” doctrine is untenable and should be reconsidered. *Cf. KBC Asset Mgmt.*, 19 F.4th at 612 (refusing to “assume scienter because part of [the company’s] business plan was not going smoothly”); *San Antonio Fire & Police Pension Fund v. Syneos Health, Inc.*, 75 F.4th 232, 242 (4th Cir. 2023) (“[W]e cannot impute factual knowledge to individuals merely based on their professional position.”).

II. The Panel’s Falsity Holding Misunderstands Risk Disclosures and Will Harm Businesses and Investors.

The panel also held that Plaintiffs adequately alleged falsity based on forward-looking risk disclosures. Though the PSLRA provides a safe-harbor for certain forward-looking statements, 15 U.S.C. § 78u-5(c)(1), the panel reasoned that a corporation’s forward-looking “warning about a risk that might hurt business” necessarily “serves as a comment on the *present* state of affairs,” and suggests “that the circumstance posing the risk has not yet occurred.” A32. On that reasoning, the panel held that Funko’s warnings about risks to its business from “excess inventory” and

“information technology” concerns were false because they implied the company was not currently facing such issues. A35, A37. The panel reiterated the view that risk disclosures are misleading “where they ‘warn[] that risks ‘could’ occur when, in fact, those risks had already materialized.” A30 (quoting *In re Facebook, Inc. Securities Litig.*, 87 F.4th 934, 948-49 (9th Cir. 2023)). That logic misunderstands SEC-mandated risk disclosures and will harm businesses and investors.

The Supreme Court has made clear that Section 10(b) and Rule 10b-5(b) “do not create an affirmative duty to disclose any and all material information,” but rather require disclosure “only when necessary ‘to make . . . statements made, in the light of the circumstances under which they were made, not misleading.’” *Macquarie Infrastructure Corp. v. Moab Partners, LP*, 601 U.S. 257, 264 (2024) (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)). “[W]hether a statement is ‘misleading’ depends on the perspective of a reasonable investor,” which “reads each statement” within the document in “its full context.” *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186, 190 (2015).

The relevant “context” here is the requirement that companies disclose any “material factors that make an investment . . . speculative or risky” and “concisely explain how each risk affects” the company or the securities offered. 17 C.F.R. § 229.105. In requiring companies to discuss material factors that make investment “risky,” *id.* § 229.105(a), the regulations require disclosures to be “inherently *prospective* in nature,” *Newtyn Partners, LP v. Alliance Data Sys. Corp.*, 165 F.4th 947, 964 (6th Cir. 2026) (emphasis added) (quoting *Bondali v. Yum! Brands, Inc.*, 620 F. App’x 483, 491 (6th Cir. 2015)). That is apparent from the ordinary meaning of “risk” or “risky”—which refer to the future “*possibility* of loss, injury, disadvantage, or destruction.” *Bondali*, 620 F. App’x at 491 (quoting *Webster’s Third New International Dictionary* 1961 (1986)).

Risk disclosures therefore require companies to warn investors “of what harms *may* come to their investment”—not to describe “what harms are currently affecting the company.” *Id.* That is underscored by the fact that other SEC regulations require disclosure of current or past incidents that may be material. *See, e.g.*, 17 C.F.R. §§ 229.103(a) (requiring companies to describe “any material pending legal proceedings”); 229.106(b)(2) (requiring companies to describe “any risks from cybersecurity threats,

including as a result of any previous cybersecurity incidents”); 229.303(b)(2)(ii) (requiring companies to “[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material” impact on sales or revenue). Risk disclosures play a distinct but complementary role by providing a forecast of the uncertainties facing the company’s future prospects.

Given the text and context of the risk-disclosure requirements, a reasonable investor would not conclude that a risk disclosure’s “use of future tense” implies “anything about the present,” *Newtyn Partners, LP*, 165 F.4th at 964, as the panel erroneously believed. Instead, a reasonable investor reading a risk disclosure in its full context would understand that the disclosure is “intended to educate the investor on *future* harms,” not discuss “the current state of a corporation’s compliance, safety, or other operations.” *Bondali*, 620 F. App’x at 491. The Sixth Circuit has therefore rejected the argument that a company’s risk disclosure warning “that top sponsors could exit [a] program” falsely implied “that top sponsors have not departed.” *Newtyn Partners, LP*, 165 F.4th at 964.

The panel’s contrary approach goes beyond even other Circuits that have held that forward-looking risk disclosures can be false or misleading

about the present in certain circumstances. Other courts have allowed such claims to proceed only where the alleged facts show that the defendant “knew” at the time of the challenged disclosure that the warned-of harm “was *virtually certain*” to occur. *Indiana Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1256-57 (10th Cir. 2022) (emphasis added); *Set Cap. LLC v. Credit Suisse Grp., AG*, 996 F.3d 64, 85-86 (2d Cir. 2021) (finding disclosure misleading where company “knew with virtual certainty” its activity would cause harm); *accord Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 137-38 (1st Cir. 2021); *Williams v. Globus Med., Inc.*, 869 F.3d 235, 243 (3d Cir. 2017). Although that standard is itself amorphous, the panel here did not suggest any such limitation. Instead, it found that Funko’s disclosures were false or misleading even as its inventory and technological concerns developed over the course of several months. A31, A34-37. The panel concluded, for example, that Funko’s risk statements about the potential for “excess inventory” to lead to a write-down and its discussion of a write-down that occurred in 2019 were false or misleading, but did not find that a write-down was certain to occur when those statements were made in 2022. *See* A9-10, A34-35.

The panel’s holding is unworkable and will open the courthouse doors to hindsight-based securities-fraud claims. “[C]ompanies do not have an obligation to offer an instantaneous update of every internal development.” *Weston Fam. P’ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 620 (9th Cir. 2022). And businesses have legitimate reasons to avoid disclosing developments prematurely, when the company may still be able to address the issue without causing unwarranted investor concern. If a company is diligently working to mitigate a developing risk and avert harm before it occurs, when does the company’s truthful disclosure about future risk imply something false about the present? The panel’s decision offers little guidance. And plaintiffs bringing securities-fraud claims will always be able to allege after the fact that the company knew that its mitigation efforts would be fruitless and that harm was inevitable.

The panel’s expansive view of liability will also harm investors. The Supreme Court has recognized that “informed decisionmaking” suffers when investors are “bur[ied] . . . in an avalanche of trivial information.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976). To avoid being accused of creating a false impression about present or past circumstances, public companies may feel they have no choice but to bloat

risk disclosures with information. Risk factor disclosures are already “on average one of the longest sections” of companies’ annual reports. Paul S. Atkins, *Remarks at the Texas A&M School of Law Corporate Law Symposium* (Feb. 17, 2026), <https://tinyurl.com/mr34whf4>. As the current SEC chair recently explained, this is “likely not the result of the SEC’s rule”—which encourages companies to be concise and targeted—but rather a fear of litigation. *Id.*; see 17 C.F.R. § 229.105. The panel’s approach will exacerbate these concerns. Faced with “ever-increasing amounts of disclosure,” investors will be left to sift through the information to discern what is most significant. Mary Jo White, *The Path Forward on Disclosure*, SEC (Oct. 15, 2023), <https://tinyurl.com/bdvxwp2p>.

III. The Panel’s Errors Will Exacerbate an Ongoing Concern of Meritless Events-Based Litigation.

This Court should grant en banc review to correct the panel’s significant errors. Left uncorrected, the panel’s expansive view of scienter and liability will allow baseless securities-fraud claims to proceed, and it will further fuel an ongoing wave of events-driven securities-fraud lawsuits that harm investors and companies.

As described above, Congress enacted the PSLRA to serve as an important safeguard against abusive securities-fraud claims. But while

the PSLRA has curbed “strike suits” and other abusive practices, meritless claims remain an ongoing concern. *From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation* 8-9, Chubb (June 2019), <https://tinyurl.com/zmzn2wwy> (providing timeline of key developments). The number of securities class actions increased every year from 2014 to 2019, “breaking new records each time.” *Id.* at 2. In 2019 alone, plaintiffs filed 428 securities class actions, nearly double the average for the preceding decade. U.S. Chamber of Commerce Inst. for Legal Reform, *An Update on Securities Litigation*, ILR Briefly 3 (Mar. 25, 2020), <https://tinyurl.com/2jwccta7>. The total number of suits has ebbed from that peak—but the dollar value of those cases has soared. Cornerstone Research, *2025 Year in Review Securities Class Action Filings* 1 (2026), <https://tinyurl.com/2b46fmum>. The threat of liability, moreover, has made it more difficult for companies to insure their directors and officers. U.S. Chamber of Commerce Inst. for Legal Reform, *An Update on Securities Litigation*, at 6.

A growing proportion of these suits consist of event-driven litigation. Such cases generally follow a familiar pattern: Following an adverse event, securities-fraud plaintiffs search for any public statements by the

company conceivably related to the event and sue alleging that the company misled investors. *See* Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth*, Institutional Shareholder Services 4 (Dec. 1, 2020), <https://ti-nyurl.com/4k54tah5>. Risk-disclosure claims are a key component of this strategy. Because many adverse events relate to risks that are subject to a company’s risk disclosures, many event-driven suits are premised on the theory that the event “was the materialization of an under-disclosed or downplayed risk.” *Id.*

These event-driven lawsuits are frequently criticized as “opportunistic,” and commentators have observed that they lack merit, as little evidence suggests the corporations involved had the requisite scienter to commit fraud. *See* Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1331, 1333-34, 1339-41, 1351-52, 1356 (2022). But despite the high stakes and poor merits, event-driven lawsuits have proven difficult to counteract. Event-driven claims have generally been dismissed at a lower rate than other securities-fraud cases and have yielded significant settlement sums. *Id.* at 1346; *accord id.* at 1334 (observing, paradoxically, that event-driven cases “have significantly lower

dismissal rates and generate higher settlements” than traditional securities-fraud cases).

The panel’s scienter and falsity holdings will further fuel this trend, making it easier for securities-fraud claims to proceed whenever opportunistic plaintiffs, with the benefit of hindsight, can argue that executives minimized a material risk and must have known about it given its importance to the company’s operations. The panel’s decision thus threatens precisely the sort of abusive lawsuits the PSLRA was enacted to guard against. En banc review is warranted to avoid these consequences.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Date: April 13, 2026

Janet Galeria
Kevin R. Palmer
U.S. CHAMBER LITIGATION
CENTER
1615 H. St. NW
Washington, DC 20062

Respectfully submitted,

/s/ Megan Barbero
Megan Barbero
Courtney L. Dixon
VENABLE LLP
600 Massachusetts Ave., NW
Washington, DC 20001
(202) 344-4540
mbarbero@venable.com

Kyle H. Keraga
VENABLE LLP
750 East Pratt St., Suite 900
Baltimore, MD 21202
(410) 244-7650
khkeraga@venable.com

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I certify that on April 13, 2026, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit via CM/ECF. I further certify that all participants in this case are registered CM/ECF users, and that service will be accomplished through the CM/ECF system.

Dated: April 13, 2026

By: /s/ Megan Barbero