No. 22-200

IN THE

# Supreme Court of the United States

SLACK TECHNOLOGIES, LLC
(F/K/A SLACK TECHNOLOGIES, INC.), ET AL.,

*Petitioners*,

v.

FIYYAZ PIRANI,

*Respondent.*

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

## BRIEF OF RESPONDENT


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## QUESTION PRESENTED

Whether Sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), require plaintiffs to plead and prove that they bought shares identified as being registered in the registration statement they claim is misleading.

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## BRIEF OF RESPONDENT

The Securities Act of 1933 was enacted in the aftermath of the worst economic crisis the Nation has ever suffered. In the run up to the stock market crash of 1929, "some 50 billions of new securities were floated in the United States." H.R. Rep. No. 73-85, at 2 (1933) (House Report). "Fully half or $25,000,000,000 worth of securities floated during this period have been proved to be worthless," *ibid.*, amounting to more than *half a trillion* dollars today adjusted for inflation.[1] The public purchased those worthless securities, Congress determined, because they lacked the "facts essential to estimating the worth of any security." *Ibid.* To address that problem and restore public confidence in our markets during the depths of the Great Depression, Congress made investors a promise in the Securities Act of 1933: It would require issuers of new securities to submit to the government and the public detailed information about the company, its finances, and its plans. Congress then assured investors that they could rely on the accuracy of those representations, and on the market prices that would inevitably be based on those filings, by providing express private rights of actions to all who purchased "such security" if those representations turned out to be false or misleading. *See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2).

Issuers viewed the civil liability provisions as draconian and unfair, but Congress and President Roosevelt were convinced that public faith in the stock market had been so badly damaged by the "history of

[1] *See* U.S. Inflation Calculator, https://www.usinflation calculator.com (last visited Feb. 27, 2023).

recent spectacular failures" that our capital markets could be restored only by placing upon issuers "a duty of competence as well as innocence." House Report at 9. For the next ninety years, issuers and parts of the business community regularly lobbied Congress to repeal or water down the Securities Act civil liability provisions. While Congress made some modifications, the basic assurance to investors remained intact.

Petitioners in this case claim to have found a way to achieve through litigation what they could not accomplish through the political process. Using a newly approved "direct listing" method of selling shares, Slack went public by introducing millions of shares, worth billions of dollars, onto a public exchange through its founding investors and other insider shareholders. The direct listing rules required Slack to file a registration statement containing the usual information, which Slack's management prepared and signed. The market price for Slack shares was determined in substantial part based on the representations in the registration statement. No one can dispute that if those representations were materially false, everyone who bought shares in the offering suffered exactly the kind of injury the Securities Act is intended to remedy through its private rights of action.

Yet petitioners claim those remedies are not available. They ask this Court to adopt a restrictive interpretation of the Act that limits its remedies to purchasers of "registered shares." And they claim that by choosing to register only some of the shares to be offered, they have prevented *anyone* from recovering, because it "is impossible" to show that any given share a victim purchased was registered, Pet. App. 40a, even though is it certain that hundreds of millions of registered shares were sold.

It is inconceivable that Congress intended this result. Indeed, petitioners make little effort to claim that it did. Instead, they insist that their release from the long-begrudged provision of the Securities Act is a happy accident, arising from the confluence of unambiguous text and a shift in trading practices.

If that were true, it would be this Court's unfortunate duty to rule in petitioners' favor and let the chips fall where they may. But it is not true. The statutory language petitioners rely upon – "such security" – does not compel their reading. And the structure, design, and purposes of the Act all dictate an interpretation that avoids the self-destruction of the Act's private enforcement provisions petitioners seek.

## STATEMENT OF THE CASE

### I. Legal Background

#### A. History And Purposes Of The Securities Act

The Securities Act sought to address the root causes of the market crash precipitating the Great Depression in two important ways. First, the statute "provid[ed] protection against fraud and misrepresentation." S. Rep. No. 73-47, at 1 (1933) (Senate Report). Section 17 of the Act, for example, prohibited employing "any device, scheme, or artifice to defraud" in "the offer or sale of any securities." 15 U.S.C. § 77q(a)(1).

But Congress did not believe that simply banning outright fraud was enough. Fraud was already illegal under state common law and under many states' "blue sky" statutes. Senate Report at 2. Those laws had proven ineffective. Accordingly, to "restore the confidence of the prospective investor in his ability to select sound securities," *id.* at 1, Congress also enacted registration and other disclosure requirements, backed by express private rights of action "designed to assure compliance" and provide injured investors an effective remedy. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983).

### B. The Securities Act And Its Requirements

#### *1. Registration Statements*

The cornerstone of the Securities Act is its requirement in Section 5 that "[u]nless a registration statement is in effect as to a security," it shall be unlawful to use instrumentalities of interstate commerce "to sell such security." 15 U.S.C. § 77e(a)(1); *see also id.* § 77e(c). A registration statement must include detailed information about the issuer's business, including financial reports and other information critical to the valuation of any of the company's shares. *Id.* § 77g; *see also id.* § 77aa. The registration statement is prepared by the company, is signed by those responsible for its contents, and receives extensive review by the Securities and Exchange Commission (SEC). *See id.* §§ 77f, 77h.

The statute includes only two exemptions from the registration requirement. Section 3 exempts certain *securities* from almost all of the provisions of the Securities Act, including the registration requirement. 15 U.S.C. § 77c. Section 4 provides that a set of *transactions* are exempt from the registration requirement in particular. *Id.* § 77d.[2] As most relevant here, the provision excludes "transactions by any person other than an issuer, underwriter, or dealer." *Id.* § 77d(a)(1). The word "underwriter" is defined broadly, to include "any person who has purchased from an issuer with a view to . . . the distribution of any security." *Id.* § 77b(a)(11). That expansive definition is intended to prevent issuers from avoiding registration by introducing shares to the market through an intermediary, such as corporate insiders or initial investors. *See* 17 C.F.R. § 230.144. With that in mind, SEC Rule 144 elaborates conditions under which a person, having acquired shares from an issuer, will be considered not to be engaged in the distribution of such securities (and therefore not acting as an underwriter) when she resells the securities. *See ibid.*

*2. Prospectuses*

Congress also regulated the use of a prospectus, which it defined broadly to include "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security," with certain exceptions not pertinent here. 15 U.S.C. § 77b(a)(10). A prospectus must contain most of the information required in the registration statement. *Id.* §§ 77e(b)(1), 77j(a)(1).

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[2] It is common to refer to "exempt shares," but this is only a shorthand for a share that could lawfully be sold in a particular transaction without the filing of a registration statement.

### *3. Civil Liability Provisions*

Congress believed that the Act's disclosure provisions required rigorous private enforcement in order to "render[] them practically valuable." House Report at 9. To that end, and over the bitter and unrelenting opposition of many in the business community, Congress enacted Sections 11 and 12.[3]

***Section 11.*** Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Huddleston*, 459 U.S. at 381-82 (footnote omitted). It provides that when "any part of the registration statement . . . contained an untrue statement of a material fact or" a material omission, "any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may" sue the issuer and various individuals involved in preparing the statement. 15 U.S.C. § 77k(a).

While capacious in some respects, the cause of action is strictly limited in others. Issuers are subject to a form of strict liability, but some other potential defendants are liable only for negligent conduct. 15 U.S.C. § 77k(a), (b). Congress further capped and limited damages, imposed a short one-year statute of limitations and three-year statute of repose, and authorized defendants to recover costs and attorney's

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[3] *See, e.g.*, Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* 72 (1982) ("The hostility of the business community to the Securities Act, especially its civil liability provision" was "intense"); *id.* at 76-77 (same).

fees from plaintiffs in meritless cases. *See id.* §§ 77k(e),77m.

***Section 12.*** Congress provided a similarly tailored cause of action for those injured by a false or misleading prospectus. Section 12 provides that

> Any person who . . . offers or sells a security (whether or not exempted by the provisions of section 77c of this title. . . ) . . . by means of a prospectus or oral communication, which includes an untrue statement of material fact . . . and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable . . . to the person purchasing such security from him. . . .

15 U.S.C. § 77*l*(a)(2). Section 12 thus applies more narrowly than Section 11, reaching only those who sold a security to the plaintiff. The provision employs a negligence standard and is subject to the same short statutes of limitations and repose as Section 11. *Id.* §§ 77*l*(a), 77m.

## II. Background On Securities Trading

Petitioners urge the Court to hold that "Sections 11 and 12 require plaintiffs to plead and prove that they bought *registered shares*," which, they say, requires tracing each specific share a plaintiff purchased back to the shares specified in the registration statement challenged as misleading. Br. 19 (emphasis added); *see also id.* 24. Evaluating that request requires some background on the relationship between registration statements and how shares are traded.

### A. Trading And Registration Statements

Although it is common to speak of "registered shares," Br. 19, the Act does not use the term and provides no definition for it. Nor has the Act ever required that shares be individually identifiable as registered or not. Indeed, it is generally impossible to tell whether a share is a "registered share" by looking at the registration statement or the share certificates (or their electronic counterparts).

1. While Section 6 says that a "registration statement shall be deemed effective only as to the securities *specified therein*," 15 U.S.C. § 77f(a) (emphasis added), registration statements do not specify individual shares covered by the filing. In this case, for example, Slack's registration statement stated the company was registering "up to 118,429,640" shares of Class A common stock held by various insiders and affiliates. C.A. E.R. 49, 51. But the statement also made clear that the registered shareholders held millions of shares that Slack was purporting *not* to register. *Id*. at 535. For example, Slack stated that petitioner Butterfield, its CEO, owned more than 41 million shares and was registering approximately 11 million of them. *See ibid*. But it did not identify which of his 41 million shares he was registering or provide any way to identify them. *Ibid*.

Nor is registration status identified on the shares themselves when they are traded. The Act has never required that a share's registration status be recorded on individual stock certificates or their electronic counterparts. And although the SEC has urged issuers to voluntarily mark unregistered shares with a "restrictive legend," it has also required that the legend be removed from exempt shares before they are sold.[4] As a result, a share with no legend could either be a registered or an exempt share.

2. In some circumstances, one can nonetheless infer that a purchased share must have been registered. In a modern initial public offering (IPO), all the newly issued shares must be registered, and underwriters generally require insiders and initial investors holding pre-existing shares to agree not to sell them during a post-IPO "lockup" period. Pet. App. 7a. When that happens, shares purchased during the lockup period are presumably registered.

But even that is just happenstance. It is unclear how common lockup periods were when Congress enacted the Securities Act. But nothing in the statute has ever required the practice. Indeed, in the aftermath of cases imposing tracing requirements on Section 11 plaintiffs, some securities defense lawyers have proposed that underwriters permit some privately held exempt shares to be sold simultaneously with new IPO shares in order to undermine investors' ability to bring claims under the Securities Act.[5]

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[4] Use of Legends and Stop-Transfer Instructions as Evidence of Nonpublic Offering, Securities Act Release No. 33-5121, 1971 WL 120470 (Feb. 1, 1971); SEC, "Restricted" Securities: Removing the Restrictive Legend, https://www.sec.gov/answers/restric.htm (last modified Jan. 16, 2013).

[5] *See, e.g.*, Boris Feldman, A Modest Strategy for Combatting Frivolous IPO Lawsuits, Harv. L. Sch. Forum on Corp. Governance (Mar. 13, 2015), https://corpgov.law.harvard.edu/2015/03/13/a-modest-strategy-for-combatting-frivolous-ipo-lawsuits/.

### B. Direct Listings

This case involves another form of initial public offering that the securities defense bar has likewise claimed companies can use to avoid potential liability under Section 11.

In 2008, the New York Stock Exchange (NYSE) sought SEC approval of rule changes allowing for a "direct floor listing."[6] The Exchange explained it had "been approached by a number of private companies that would like to list upon the effectiveness of a selling shareholder registration statement." 73 Fed. Reg. at 54,442. These private companies, it explained "typically have sold a significant amount of common stock to qualified institutional buyers in one or more private placements and, as a condition to those sales, have agreed to file a registration statement to facilitate the resale of the privately-placed shares." *Ibid*. The Commission approved the changes to "provide a means for a narrow category of companies whose stock is not previously registered under the Act and that are listing upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, to list on the Exchange." *Id*. at 54,443.

Thus, as petitioners acknowledge, "[u]nlike a traditional initial public offering, in which newly registered shares are traded on an exchange for an initial period before pre-existing unregistered shares

[6] *See* Order Approving Proposed Rule Change To Determine That a Company Meets the Exchange's Market Value Requirements by Relying on a Third-Party Valuation of the Company, Exchange Act Release No. 34-58550, 73 Fed. Reg. 54,442 (Sept. 19, 2008) (2008 Order).

can be traded," a direct listing "enables all existing shares—including those exempt from the Securities Act's registration requirement—to be traded on an exchange immediately." Br. 2.

Notably, the Commission required a "selling shareholder registration statement" without regard to whether the sale would otherwise be exempt from registration under Section 4, as could frequently be the case where the selling shareholder was not an "issuer, underwriter, or dealer." 15 U.S.C. § 77d(a)(1); *see* 17 C.F.R. § 230.144. Nor did the Commission expressly permit that statement to register only some of the shares the shareholders would be selling. The NYSE rule today thus permits direct listings "at the time of effectiveness of a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares," with no exception for when all of the shareholder shares are exempt and no authorization for registering only a portion of the shares to be sold. NYSE Listed Company Manual § 102.01B n.E.[7]

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[7] The parties have litigated this case on the premise that Slack was not required to register all the shares to be sold in the direct listing. Because respondent did not challenge that premise previously, the Court could make the same assumption for purposes of this case. But there is reason to think the premise is false. As noted, the Commission required a registration statement for the "selling shareholder" – *i.e.*, the shareholders who would be selling shares in the direct listing. That includes sales that would otherwise be exempt under Rule 144, as likely would have been the case for the institutional investors who prompted the rule. It would seem to follow, then, that when the SEC approved it, the Commission understood the rule to require a "selling shareholder registration statement" that would

In 2018, the NYSE applied to change certain rules regarding valuation of shares in a direct listing.[8] As part of the request, it also "proposed changes . . . that would have allowed a company to list immediately . . . without any concurrent IPO or [Securities Act] registration." 83 Fed. Reg. at 5651 n.11. However, after amending the proposal twice without obtaining Commission approval, the exchange submitted a third amendment, the sole change in which was to remove the proposal to eliminate the registration requirement. *Ibid.* With that change, the Commission approved the proposal, finding that "as modified," the proposal would "protect investors and the public interest." *Id.* at 5653.

In recent years, prominent law firms have advised companies to consider taking advantage of direct listings to diminish their exposure to Section 11 liability. For example, one of the law firms that advised Slack in its direct listing published an article calling "the potential to deter private plaintiffs from bringing claims under Section 11" an "important advantage of the direct listing."[9] The article argued

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encompass all the selling shareholders' shares without regard to whether they might be otherwise exempt from registration under Section 4 or Rule 144.

[8] *See* Order Granting Accelerated Approval of Proposed Rule Change to Amend Section 102.01B of the NYSE Listed Company Manual, Exchange Act Release No. 34-82,627, 83 Fed. Reg. 5650 (Feb. 8, 2018) (2018 Order).

[9] Andy Clubok et al., *Complex and Novel Section 11 Liability Issues of Direct Listings*, ALM | LAW.COM Corporate Counsel (Dec. 20, 2019), https://www.law.com/corpcounsel/2019/12/20/complex-and-novel-section-11-liability-issues-of-direct-listings/?slreturn=20220928204408.

that in a direct listing, registered and unregistered shares are comingled from the first moment of trading, making it "difficult (if not impossible)" for plaintiffs to show that the shares they purchased were registered, which the authors believed was required to establish standing under Section 11. Clubok, *supra*.

### III. Factual and Procedural Background

1. In 2019, petitioners took Slack public through a direct listing that introduced nearly a billion dollars' worth of its shares to public markets for the first time.

Although Slack itself issued no new shares in the offering, it filed a registration statement, signed and approved by the individual petitioners, as required by the direct listing rule. Slack purported to register only some of the shareholder shares to be sold. Br. 9. However, it also described the additional exempt shares it intended the registration statement to allow shareholders to sell through the direct listing. *See, e.g.*, C.A. E.R. 235.

Trading commenced on June 20, 2019, with up to 283 million shares (118 million of which were purportedly registered) made available for sale. Pet. App. 8a.

On September 5, 2019, Slack withdrew its registration statement as to any registered shares that had not yet been sold.[10] Slack stated that since it had been subject to statutory reporting requirements for 90 days, the registration statement was no longer

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[10] Slack Techs., Inc., Post-Effective Amendment No. 1 to Form S-1 Registration Statement (Sept. 5, 2019), https://www.sec.gov/Archives/edgar/data/1764925/000176492519000176/post-effectiveamendment.htm.

required to allow its affiliate shareholders to sell their shares to the public. *Ibid.* (citing SEC Rule 144).

2. In September 2019, respondent brought this action on behalf of a putative class, asserting that Slack's registration statement and prospectus contained material misstatements and omissions regarding, among other things, service outages, Slack's contractual obligations in the event of outages, and the scalability of its systems. Pet. App. 9a, 34a. As relevant here, the complaint asserted claims under Sections 11 and 12(a)(2) of the Securities Act. *Id.* at 9a.

The complaint alleged that respondent had purchased shares "pursuant and/or traceable to" the registration statement and prospectus. J.A. 9. In fact, respondent purchased 30,000 shares on opening day and another 220,000 shares thereafter. Pet. App. 8a. The statistical likelihood that none of initial 30,000 shares was registered is mind-bogglingly small. [11] Petitioners nonetheless moved to dismiss, arguing that respondent "cannot plead standing under Section 11 because of the case law interpreting that statute holding that a plaintiff's purchased shares must be

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[11] Assuming the pool of share sold on opening day mirrored the overall composition of shares released for sale, the chances of all respondent's shares being unregistered is approximately the probability of any given share being unregistered (here, about 58%—165 million out of 283 million shares) to the power of the number of shares purchased (here, 30,0000). *See* Cuemath, Probability, https://www.cuemath.com/data/probability/ (last visited Feb. 27, 2023). The resulting probability would be expressed by a zero, followed by a decimal point, followed by 7098 zeros, then a 7. *See* WolframAlpha, https://www.wolframalpha.com/input?i2d=true&i=Power%5B.58%2C30000%5D (last visited Feb. 27, 2023) (computation of .58 to the power of 30,000).

traced to the defective registration statement, which is impossible to do here." *Id.* at 40a. Respondent did not contest that given the comingling of registered and unregistered shares in the direct listing, he was unable to determine whether any given share was registered or not. But he argued that Section 11 applied to all the shares anyway because none could be sold without the registration statement he challenged as misleading. The district court denied the motion to dismiss but certified an interlocutory appeal. *Id.* at 50a.

3. The Ninth Circuit affirmed. Pet. App. 6a.

a. The court of appeals explained that under circuit precedent, Section 11's reference to "such security" means "a security issued under a specific registration statement, not some later or earlier statement." Pet. App. 12a-13a. Here, the court explained, there is no question about *which* registration statement controls. *Id.* at 13a. The question, instead, was "what does 'such security' mean under Section 11 in the context of a direct listing, where only one registration statement exists, and where registered and unregistered securities are offered to the public at the same time, based on the existence of that one registration statement?" *Ibid.*

To answer that question, the court "look[ed] directly to the text of Section 11 and the words 'such security.'" Pet. App. 14a. It concluded that "Slack's shares offered in its direct listing, whether registered or unregistered, were sold to the public when 'the registration statement . . . became effective,' thereby making any purchaser of Slack's shares in this direct listing a 'person acquiring such security' under Section 11." *Id.* at 18a (quoting 15 U.S.C. § 77k(a)) (ellipsis in original). The court was fortified in its reading of the text by the damage petitioners' reading would do to the statutory scheme. "[I]nterpreting Section 11 to apply only to registered shares in a direct listing context," the court explained, "would essentially eliminate Section 11 liability for misleading or false statements made in a registration statement in a direct listing for both registered and unregistered shares." *Id.* at 17a.

The court likewise held that Section 12 applied to all the shares sold in the direct listing. That provision states that any person who "*offers or sells a security . . . by means of a prospectus*" that is misleading "shall be liable . . . *to the person purchasing such security from him*." Pet. App. 19a (quoting 15 U.S.C. § 77*l*(a)(2)) (emphasis and ellipses in original). The court acknowledged that the word "prospectus" is "a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder.'" *Ibid.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 584 (1995)). But here both registered and unregistered shares were sold "by means of" such a prospectus because none of the shares could have been sold without Slack's filing of such a formal prospectus along with its registration statement. *Id.* at 20a.

The court acknowledged the individual petitioners' argument that even if this were so, they did not sell their shares to respondent by means of the prospectus within the meaning of Section 12's privity requirement. Pet. App. 20a. But the court exercised its discretion to not address the question in the interlocutory appeal, leaving the issue for further development on remand. *Id.* at 20a-21a.

b. Judge Miller dissented. In his view, Sections 11 and 12 provide a cause of action only to those who purchased "registered shares." Pet. App. 25a-26a, 29a. And he concluded that this interpretation of the statute rendered Section 11 and 12 unenforceable in a direct listing case. *See id.* at 24a. He made no pretense that this result was consistent with the fundamental purposes of the statute, or even made any sense. He nonetheless viewed the result as compelled by text and precedent. *Id.* at 30a.

## SUMMARY OF ARGUMENT

**I.** The Ninth Circuit correctly held that Section 11 provides a cause of action to anyone who purchases securities in a direct listing made possible by the filing of a registration statement. The parties agree that the critical statutory phrase, "such security," requires some relationship to a registration statement. But the text does not say what that relationship is. And when Congress intended to refer to what petitioners call "registered securities" it made that intention express in the text.

Given the textual ambiguity, the court of appeals properly considered the statutory design. Congress enacted the Securities Act to restore investor confidence in the stock market. It did so by requiring companies to file detailed registration statements investors and markets could rely on in setting share prices, confident that if the information therein proved inaccurate or misleading, they could recover their losses under Section 11. The SEC approved the direct listing mechanism on the condition that the company going public through that process would file a registration statement even if one would not otherwise be required because the shares were coming from insiders and initial investors. The point of requiring that registration statement was to provide investors and markets information they could rely on in valuing shares in the public offering, in the same way they can rely on a registration statement filed in a traditional IPO. The statutory scheme would be thwarted if investors could only count on a Section 11 remedy if they bought – and can *prove* they bought – registered shares, something they have no way of knowing at the time of purchase.

Petitioners' interpretation thus leads to a statutory regime that is not only ineffective, but arbitrary and unpredictable, denying recovery even to purchasers of registered securities (whom petitioners agree have standing) because "'it is often impossible to determined' whether shares were registered." Br. 47 (citation omitted).

Petitioners' attempts to show that Congress dictated this result all fail. Their reliance on text in other portions of the statute simply suggests what is already uncontested – that "such securities" refers to securities related to a registration statement. Nor did Congress intend Section 11 to apply to a random, freakish assortment of cases as a way of making up for the high standards it set for issuers. Petitioners say the Court need not worry about rendering the '33 Act incoherent because plaintiffs can always sue under the Securities Exchange Act of 1934. But the '34 Act did not amend the earlier statute and could not change its original meaning. Moreover, Congress would not have viewed the implied right of action under Section 10(b) as filling any important gap – that provision requires proof of scienter, which the 1933 Congress viewed as an impediment to effective private enforcement of the Securities Act.

Petitioners say that future Congresses nonetheless ratified an alleged circuit consensus limiting Section 11 to registered shares. But those cases, including Judge Friendly's decision in *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967), dealt with a different question – whether plaintiffs who bought registered shares must trace their purchase to the particular registration statement alleged to be misleading when shares have been issued under multiple registration statements. The Ninth Circuit reaffirmed that rule, but nonetheless rightly held it does not dictate the outcome in this very different case.

**II**. Section 12 is not limited to registered shares either. By its terms, the provision applies to *any* share sold by means of a misleading prospectus. Petitioners argue that in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), this Court held that the word "prospectus" refers to the formal prospectus that must be filed with a registration statement. But that is exactly the kind of prospectus respondent alleges petitioners used to sell their securities. The real question is whether Section 12 provides a remedy whenever that prospectus is used to sell any share or just registered shares. In *Gustafson*, the Court acknowledged what the statutory text makes plain: Section 12 "applies to every class of security . . . whether exempted from registration or not." *Id.* at 580 (irrelevant exception omitted).

**III**. If the Court holds that Section 11 or 12 apply only to registered shares, it should reject petitioners' request to order this case dismissed with prejudice. At the pleading stage, plaintiffs need only plausibly allege that they purchased at least some registered shares, which is easily done when a plaintiff purchases tens or hundreds of thousands of shares from a pool that contains large numbers of registered shares. Moreover, petitioners provide no basis for this Court to hold that *proving* standing at later stages of the case is impossible as a matter of law. And if necessary, the lower courts should be allowed to consider whether to adopt a reasonable burden-shifting regime to mitigate the difficulties of proof that accepting petitioners' interpretation would create.

## ARGUMENT

### I. Section 11 Is Not Limited To Registered Shares.

The principal purpose of the Securities Act was to regulate the issuance of securities for initial public sale, providing investors confidence that the information used to value those shares is truthful and accurate. This is particularly vital when, as here, a company is introducing its shares to the public for the first time because there is likely to be no prior track record of similarly reliable public information (such as the annual reports securities law requires companies to file after they go public). Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (footnote omitted).[12]

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[12] Petitioners quote *Huddleston* as suggesting that "Section 11 allows only 'purchasers of a registered security to sue.'" Br. 14

Petitioners believe they have found a way to evade this system and go public without incurring risk of Section 11 liability by simply ensuring that the initial public sale intermixes registered and unregistered shares. It would be shocking if the statute's basic protections could be so easily evaded. And, indeed, they cannot.

### A. Section 11 Applies To Any Security Whose Sale Is Permitted Only Because Of The Filing Of The Challenged Registration Statement.

Section 11(a) provides in relevant part that "[i]n case any part of the registration statement . . . contained an untrue statement of a material fact" or a material omission, "any person acquiring such security" shall have a cause of action, subject to various defenses. 15 U.S.C. § 77k(a). All acknowledge that the key phrase is "such security" and that the phrase has no grammatical referent. Everyone also agrees that "such security" refers in some manner to the "registration statement" that contained a false statement or omission. Br. 21-22. The debate is over the precise relationship required.

The Ninth Circuit held that the phrase includes any share the permissible sale of which depends on the filing of the allegedly misleading registration statement. Pet. App. 15a. All the shares sold in a direct listing meet that description because pursuant to the SEC-approved direct listing rules, the

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(quoting 459 U.S. at 381-82). But all the work is being done by the word "only," which is petitioners' addition. *Huddleston* had no occasion to address the question presented here and its generic description of Section 11 did not prejudge the answer.

simultaneous release and sale on a national exchange of both "registered" and exempt shares could not have occurred absent a registration statement. Petitioners, on the other hand, contend Section 11 applies only to "registered shares." Br. 20.

### *1. The Difference Between The Parties' Interpretation Of "Such Security" Is Narrow.*

It bears pausing at the outset to observe that the difference between the parties' positions is not as great as may appear at first glance.

Petitioners proceed as if "registered shares" were a defined term in the statute, but it is not. Indeed, the phrase is never even used. One might think that a registered share is one individually identified in the registration statement, perhaps by share certificate serial number. After all, petitioners emphasize that the statute "calls for registration only as to individual shares 'specified []in' the registration statement." Br. 29 (quoting 15 U.S.C. § 77f(a)) (alteration in original). But registration statements *do not* specify individual shares. *See supra* at 8. Nor is the registration status reflected on the physical stock certificate or its electronic counterpart. *See supra* at 8-9.

Accordingly, the only way to know which shares a registration statement is purporting to register is to ask which shares require a registration statement in order to be sold. *See* Br. 9 (stating Slack registered only "those shares that were subject to the '33 Act's registration requirement"). But that definition of a registered share – a share that could not be sold without the filing of the registration statement – is nearly identical to Ninth Circuit's definition of "such security."

To the extent the Ninth Circuit's interpretation of "such security" is modestly broader than petitioners', it accords with the best reading of the text, design, and purposes of the Act.

#### *2. The Ninth Circuit's Reading Better Comports With The Act's Text.*

Statutory construction begins with the text, read in context of the statute as a whole and in light of its design and purposes. *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In conducting this analysis, the Court "construe[s] securities law provisions 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (citation omitted) (second alteration in original).

Petitioners acknowledge that "such security" has no grammatical referent in Section 11. Br. 21. To be sure, it's a fair inference that "such securities" refers to the registration statement previously mentioned. But as Judge Friendly recognized in his influential opinion in *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967), the provision is ambiguous as to what nexus is required. "Such security" *could* mean "a security issued pursuant to the registration statement." *Id.* at 271. But it could also mean something broader. *Ibid.*

Petitioners insist that even if Congress did not say so expressly, it must have intended "such security" to mean only a "registered security." But when Congress intended *that* meaning, it made that intention express. Section 5, for example, refers to a "prospectus relating to any security *with respect to which a registration statement has been filed*." 15 U.S.C. § 77e(b)(1) (emphasis added). Section 4 uses similar language. *See id.* § 77d(a)(3)(B) ("a security as to which a registration statement has been filed"). Section 10 refers to the "offer or sale of securities *registered under this subchapter*." *Id.* § 77j(f) (emphasis added). The more reasonable interpretation is that Congress meant something different when it used the more generic term "such security."

In addition, while Section 4 expressly provides that sales described therein are exempted from the registration requirement of Section 5, it says nothing about exempting those sales from liability under Section 11. *See* 15 U.S.C. § 77d(a) ("The provisions of section 77e [Section 5] of this title shall not apply to . . . ."). This stands in contrast to Section 3, which provides a blanket exemption from all of the Act's requirements. *See id.* § 77c(a). Had Congress intended Section 4 to provide an exemption from Sections 5 *and* 11, it presumably would have said so.

#### *3. The Ninth Circuit's Interpretation Better Fits The Statute's Design And Purposes.*

Given the ambiguity in the text, the Ninth Circuit appropriately considered which reading was most consistent with the Act's purposes and design. Those considerations point decisively in respondent's favor.

Section 11 was intended to enforce the statutory obligation to be truthful in registration statements filed with the SEC and to shift the risk of error in such carefully vetted documents from investors to those responsible for drafting the disclosure. Congress recognized that markets would rely extensively on the information provided in those documents. The information Congress required is not specific to registered as opposed to exempt shares – the vast majority of the registration statement concerns the company and its finances. *See* 15 U.S.C. §§ 77g(a)(1), 77aa (Schedule A); C.A. E.R. 49-445. Material inaccuracies in those descriptions inevitably affect the market price of all securities being introduced to the market through the offering made possible by the registration statement.

Indeed, in the case of direct listings, the reason a registration statement is required is to provide investors information they can rely on when purchasing the very exempt shares petitioners say are left unprotected by Section 11. Although the direct listing in this case involved both registered and exempt shares, the rule allows direct listings even when all the sales to be sold are exempt. *See* 2008 Order, 73 Fed. Reg. at 54,442-43; Pet. App. 8a; *supra* at 11-12 & n.7. Yet, the SEC required that even when all the sales fall within an exemption, the company must still file a registration statement. Indeed, the SEC approved amendments to the direct listing in 2018 only after proponents amended the proposal to "eliminate the proposed changes . . . that would have allowed a company to list immediately . . . without any concurrent IPO or [Securities Act] registration." 2018 Order, 83 Fed. Reg. at 5651 n.11.

Why? The obvious answer is to provide purchasers of those exempt shares the basic set of information Congress deemed essential to the valuation of any security. And if the SEC thought it important for the public to have that information, it would be passing strange for Section 11 not to protect investors injured by false information in a document the market has learned to trust precisely because it is backed by the strict protections of that provision.

Guaranteeing the accuracy of registration statements is particularly important in the context of initial public offerings, where the market often lacks other sources of reliable information about the firm. In this case, for all practical purposes, the direct listing was Slack's initial public offering – it put hundreds of millions of shares onto the market, creating a market valuation of billions of dollars. That is exactly the kind of transaction for which Congress intended to require a registration statement backed by Section 11. Although Congress exempted "transactions by any person other than an issuer, underwriter, or dealer" in Section 4, *see* 15 U.S.C. § 77d(a)(1), it defined "underwriter" broadly to avoid companies evading the statutory scheme by issuing shares to insiders who then put the shares on a public exchange, *see id.* § 78b(a)(11); *SEC v. Chinese Consol. Benevolent Ass'n*, 120 F.2d 738, 741 (2d Cir. 1941) (Hand, J.) ("Section 4(1) was intended to exempt only trading transactions between individual investors with relation to securities already issued and not to exempt distributions by issuers."). Consistent with that purpose, SEC Rule 144 makes clear that the Rule's "safe harbor is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration requirements of the Act." 17 C.F.R. § 230.144. And it provides that the exemption is unavailable unless "[a]dequate current public information with respect to the issuer of the securities" is "available." *Id.* § 230.144(c).

Approving direct listings on the condition that a fully enforceable registration statement be filed is consistent with the statute and regulations' anticircumvention principle and full-disclosure philosophy.[13] Reading the statute to allow petitioners to evade Section 11 by arranging to comingle registered and unregistered shares in its initial public offering is not.

*4. Petitioners' Reading Leads To Arbitrary, Bizarre Results Congress Could Not Have Intended.*

Petitioners' reading of the statute is not only inconsistent with its design. It also leads to arbitrary results no rational Congress would have intended.

On petitioners' reading, the Act provides no remedy for otherwise identically situated investors suffering indistinguishable injuries inflicted by the same registration statement, if one happened to purchase exempt shares and the other purchased registered shares even though those shares were released for public sale simultaneously and cannot be told apart. That makes no sense, but it gets worse. On petitioners' reading, Section 11 does not simply operate narrowly, but freakishly, providing a remedy in a random, unpredictable assortment of cases while failing to provide any assurance to investors in advance that they will be able to recover if misled by a false registration statement. Indeed, even those who

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[13] At times petitioners seemingly seek to diminish the status of the direct listing rule by referring to it as a rule of the NYSE. *See* Br. 40. But federal law prevents the sale of securities on a national exchange except through rules approved by the SEC, which the exchange is required by statute to enforce. *See* 15 U.S.C. §§ 78f(a), 78f(b)(1), 78f(b)(5), 78s(b)(2)(C)(i). There is no relevant distinction between an SEC-approved exchange rule and, say, an SEC regulation requiring a registration statement.

actually purchased registered shares – whom petitioners acknowledge Congress intended to provide a remedy – will recover only when the stars align to permit tracing that will *prove* the shares were registered, something petitioners and their amici insist is "often impossible." Br. 47 (citation omitted); *see, e.g.*, Clayton & Grundfest Amicus Br. 7 & n.12 (asserting once "exempt shares legally enter the market, all subsequent purchasers lose Section 11 standing" because "tracing generally becomes impossible at that point"). It is even worse than that – even those who could prove they purchased registered shares if they had access to discovery will, under petitioners' position, have their claims dismissed because they cannot make that showing in their initial complaint. Pet. App. 40a.

On top of all this, whether Securities Act protection is available would be largely under control of issuers and sellers, effectively creating an opt-out regime for the statute's central enforcement provisions. Including even a small number of unregistered shares into the pool of securities being offered to the public allows defendants to argue that tracing is required, but "impossible to do here." Pet. App. 40a.

Petitioners are right that when "it comes to securities law, 'stability and reliance are essential.'" Br. 38 (quoting *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055 (2017)). But it is their interpretation, not the Ninth Circuit's, that would upend the present system and destroy markets' ability to rely on the veracity of the core documents Congress intended to guide the valuation of shares newly introduced to the market. This return to "philosophy of *caveat emptor*" would have pleased the opponents of the '33 Act, but is exactly what Congress intended Section 11 to avoid. *SEC. v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963) (citing House Report at 2).

### B. Petitioners' Contrary Arguments Lack Merit.

Petitioners bravely insist that this is just what Congress ordained, marshalling a variety of arguments why Section 11 should be given a self-defeating construction. But none is convincing.

#### *1. Petitioners' Textual Arguments Fail.*

Petitioners' textual evidence from other parts of the statute at most supports the uncontested conclusion that "such security" requires a nexus with the registration statement. It does not preclude the Ninth Circuit's view of what that nexus is.

*First*, petitioners argue that "such security" *does* have a referent; it's just that the referent is in Section 10, not Section 11. Br. 22. That claim is grammatically implausible. Petitioners cannot seriously claim that Congress expected readers of Section 11 to understand that "such security" refers to a type of security described in a subsection of a completely different provision discussing marketing securities on the radio. *See* 15 U.S.C. § 77j(f). Petitioners cite no case ever engaging in such cross-provisional gymnastics. And in any event, the reason we know Section 10 was referring to registered securities was because it used language – "securities registered under" the Act – Congress could have easily repeated if it had intended "such security" to mean the same thing in Section 11.

Petitioners argue (Br. 22) that "Section 11's reference to 'such security' mirrors the language used in . . . related provisions" purportedly discussing registered securities. But as petitioners recognize elsewhere, the meaning of "such" is inherently contextual and will vary based on "context or circumstances." Br. 21 (quoting *Concise Oxford Dictionary of Current English* 1218 (1931 ed.)). In fact, the phrase is used repeatedly to mean something other than "registered shares."[14]

*Second*, Section 5's requirement of a registration statement to sell non-exempt shares sheds no light on whether Section 11 applies when some other source – here, an SEC-approved rule – requires filing a registration statement. *Contra* Br. 21. It requires no leap of imagination to understand that Congress would intend the authors of *every* registration statement to guarantee the accuracy of its representations, whether filed under the compulsion of Section 5, under the rules for direct listings, or purely voluntarily.

*Third*, petitioners point (Br. 21) to Section 6's statement that a registration is effective "only as to the securities specified therein as proposed to be offered." 15 U.S.C. § 77f(a). But as discussed, this provision does not require *individual* securities to be specified and in Slack's registration statement, none were. Moreover, when the SEC has required filing of

[14] *E.g.*, 15 U.S.C. § 77c(a)(2) ("any security which is an industrial development bond . . . such security"); *id.* § 77b(a)(3) ("security-based swap . . . such securities"); *id.* § 77c(b)(1) (Commission may "add any class of securities to the securities exempted as provided in this section . . . . such securities").

a registration statement to permit sale of otherwise exempt securities, those securities are properly considered to be "specified therein." Here, for example, the registration statement specified that the direct listing would offer exempt shares as well as those Slack purported to register. *See supra* at 13.

*Fourth*, petitioners observe (Br. 21-22) that the registration filing fee is set by reference to the number of securities "proposed to be offered." 15 U.S.C. § 77f(b)(1). But even if that excluded the exempt securities in this case (which is not obvious), the schedule for filing fees is surely not the place one would expect Congress to hide the key to the correct interpretation of a different phrase in a different provision.

*Finally*, petitioners argue (Br. 22) that Section 11's damages caps make no sense unless the provision is limited to registered shares. But the argument itself makes no sense. Petitioners say Section 11(e) "tie[s] the maximum recovery under Section 11 to the value of *the registered shares offered to the public*." *Id.* 23 (emphasis added). That would be true, but for the word "registered." What the provision actually says is that the damages are capped in relation to "the price at which the security was offered to the public." 15 U.S.C. § 77k(e), (g). There's no reference to "registered" shares and no reason to imply one. The caps' application in a direct listing case is straightforward: the "price at which the security was offered to the public" is the price at which all the securities (registered or not) were offered to the public. *See* C.A. E.R. 447 (prospectus explaining that "the designated market maker will determine an opening price for our Class A common stock in consultation with a financial advisor pursuant to applicable NYSE rules"); *see also id.* at 543-44.

### 2. *Congress Did Not Make Up For Section 11's Strict Standards By Giving It Limited Reach And Random Application.*

Contrary to petitioners' contention (Br. 30), Congress imposed a heightened duty of care in the Securities Act because it believed the provisions' strictness was "just and necessary," not because it anticipated the provisions would apply infrequently or to a random assortment of cases. House Report at 23.

While it may be unfair to hold a company strictly liable for a careless misstatement in an earnings call, Congress believed it "the essence of fairness to insist upon the assumption of responsibility for the making of these statements" in formal documents "prepared with care" after an opportunity to conduct "due diligence." House Report at 10, 23-24; *Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995). "If one of two presumably innocent persons must bear a loss," Congress concluded, "it is familiar legal principle that he should bear it who has the opportunity to learn the truth and has allowed untruths to be published and relied upon." Senate Report at 5.

The provisions' heightened standards were also necessary, Congress believed, "to make the buyer's remedies under these sections practically effective." House Report at 9. The pre-existing remedies at common law had proven ineffectual and Congress viewed the scienter requirement in particular as an impediment to providing injured parties the relief necessary to restore public confidence in the stock market. *See, e.g.*, Senate Report at 5; Elisabeth Keller

& Gregory A. Gehlmann, *Introductory Comment: Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio State L.J. 329, 332 (1988).

Congress made up for the strict aspects of Section 11 through "a number of explicit restrictions and qualifications on the right to sue." SEC Amicus Br. at 13, *In re: Wrt Energy Sec. Litig.*, 2003 WL 24136189 (2d Cir. 2003); *see Huddleston*, 459 U.S. at 382-86 & nn.13, 18, 22; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 207-11 (1976). As noted, Section 11 applies only to discrete formal documents subject to extensive vetting. Congress enacted a short one-year statute of limitations and an absolute three-year statute of repose. 15 U.S.C. § 77m. Section 11 precludes liability when the plaintiff knew of the misrepresentation or cannot prove reliance after the company issues an earnings statement covering at least one year. *Id.* § 77k(a). Some defendants can escape liability by proving that they did not know of the misstatements or omissions and exercised reasonable care. *Id.* § 77k(b). All defendants may limit liability to the damages caused by the misstatement. *Id.* § 77k(e). And the district court may assess attorney's fees against plaintiffs who bring meritless Section 11 claims. *Ibid.*

*3. The '34 Act Did Not Alter The Meaning Or Scope Of The '33 Act's Civil Liability Provisions.*

Petitioners assure the Court that even if their interpretation makes private remedies under the '33 Act practically unavailable, alternative investor protection is available under Section 10(b) of the '34 Act. Br. 30. That argument fails as well.

There is no indication that the 1933 Congress intended Sections 11 and 12 to be limited, partial solutions to the problems it addressed, hoping that some future legislation would make up for its inadequacies down the line. *See* Senate Report at 1. Nor, in any event, would Congress have viewed Section 10(b) as an adequate substitute for Section 11. The '33 Act already included a parallel anti-fraud provision, Section 17, which Congress viewed as insufficient to fully protect investors. *See* 15 U.S.C. § 77q(a). Moreover, the 1933 Congress was adamant that requiring proof of scienter, as Section 10(b) does, would render any remedy ineffective. *See supra* at 32-33. Petitioners may disagree with that judgment. But absent an express or implied repeal, the '34 Act could not change the meaning of the provision enacted a year earlier. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

Petitioners respond that the Court should overlook chronology in the name of construing the two statutes "harmoniously." Br. 30 (citation omitted). But this Court has never pursued harmony at the cost of giving either statute less than the full scope Congress intended at the time of enactment. In *Huddleston*, 459 U.S. 375, for example, the Court rejected the inverse of petitioners' argument – *i.e.*, that Section 10(b) should be construed narrowly to avoid overlap with Section 11. The Court explained that "is hardly a novel proposition that the 1934 Act and the 1933 Act 'prohibit some of the same conduct'" and therefore provide overlapping remedies. *Id.* at 383 (citation omitted); *see also Gustafson*, 513 U.S. at 593 (Thomas, J., dissenting) (rejecting "arguments that we should read § 12[a](2) narrowly in order to avoid redundancy in securities regulation.").[15] Giving each provision its natural breadth is fully consistent with that legislative decision, even if it means that plaintiffs sometimes may pursue the cause of action that is easiest to prove. *Compare Huddleston*, 459 U.S. at 386 (a "cumulative construction of the securities laws also furthers their broad remedial purposes"), *with* Br. 41 (objecting to plaintiffs' being able to "pick and choose" a remedy).

#### 4. *Petitioners' Reliance On* Barnes *Is Misplaced.*

Petitioners argue that whatever its flaws, their interpretation has the benefit of a pedigree, arising from Judge Friendly's interpretation of Section 11 in *Barnes*, which, they say, has since been accepted by other courts and ratified by Congress. Br. 31-38. That is incorrect.

In *Barnes*, the Second Circuit held that when a company has issued shares at two different times pursuant to two different registration statements, a plaintiff must trace the shares she purchased to the registration statement she alleged was misleading. 373 F.2d at 272. In so holding, *Barnes* did not establish that "that plaintiffs suing under the '33 Act must plead and prove they bought registered shares" rather than exempt shares. Br. 31. *All* of the shares

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[15] The assertion that Congress intended an important category of claims to be addressed by the implied right of action under Section 10(b) rather than the express rights of action in the Securities Act is difficult to reconcile with the contention often made by securities fraud defendants that the 1934 Congress did not intend Section 10(b) to provide a private right of action.

in *Barnes* were "registered shares"; the question was whether they had to be registered under the allegedly misleading registration statement. *See* 373 F.2d at 270. All but one of the cases petitioners cite as forming the circuit consensus allegedly ratified by Congress similarly involved multiple registration statements. *See* Br. 23-24, 31-32.[16] The Ninth Circuit reaffirmed that precedent in this case. *See* Pet. App. 13a-14a.

Petitioners argue that the tracing required in the multiple-registration statement context is just as impractical and leads to the same arbitrary results as the tracing they would require in a direct listing. Br. 35-36. That Judge Friendly was willing to accept that consequence, they argue, should lead this Court to do the same. *Ibid*. This Court, however, has never endorsed *Barnes*'s interpretation of the Act. Moreover, tracing in multiple-registration cases is materially simpler than in a direct listing. Courts have generally found standing satisfied, for example, by showing that the plaintiff purchased shares directly from an underwriter in the secondary listing at the opening price without paying a commission. *See, e.g.*, *Tsirekidze v. Syntax-Brillian Corp*., 2009 WL 2151838, at *2 (D. Ariz. July 17, 2009); *Kirkwood v. Taylor*, 590 F. Supp. 1375, 1378 (D. Minn. 1984), *aff'd*, 760 F.2d 272 (8th Cir. 1985). That cannot be done in a direct listing case because there is no underwriter and no lockup period. As a result, registered and exempt shares are intermingled from the moment the shares hit the market, which petitioners and their amici claim makes tracing "impossible." Pet. App. 40a.

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[16] The exception is *Krim v. pcOrder.com, Inc*., 402 F.3d 489 (5th Cir. 2005), discussed *infra* at 47.

### 5. *The SEC Has Never Endorsed Petitioners' Position.*

Petitioners' claim (Br. 33) that the SEC endorses its reading is wrong as well. While the Commission's amicus brief in *Barnes* rejected the broad reading of Section 11 as encompassing any share of the same class issued under any registration statement, it did not consider the narrower reading accepted by the Ninth Circuit here in this new and novel context. *See id*. 25. Neither did the question arise in any of the other amicus briefs petitioners cite (*id*. 34-35).

It is no surprise, then, that in approving another form of direct listings, the SEC found that "the proposed rule change is consistent with investor protection" because it would "require all Primacy Direct Floor Listings to be registered under the Securities Act" and subject to "the existing liability framework."[17] The Commission did not assume, as petitioners do, that Section 11 would be missing from that liability framework. To the contrary, the Commission acknowledged the rule of *Barnes* governed multiple-registration cases, but treated Section 11's application to direct listings as an open question, the only authority on which was the district court decision in this case holding that Section 11 applied. 85 Fed. Reg. at 85,816 & n.107.[18]

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[17] Order Approving a Proposed Rule Change to Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807, 85,815 (Dec. 22, 2020).

[18] Whatever the SEC's view on the question presented here, no party claims that it is due any substantial deference.

### *6. Petitioners' Policy Objections Are Irrelevant And Unpersuasive.*

Petitioners are thus left with bare policy objections. They argue, for example, that the Ninth Circuit's interpretation "discourages innovation in methods of going public" by creating "unexpected liabilities." Br. 44-45. But petitioners' interpretation is just as likely to discourage truly beneficial innovation as encourage it. Any change in how companies go public requires SEC approval, which it can provide only if the rules "protect investors and the public interest." 15 U.S.C. § 78f(b)(5); *see id.* § 78s(b)(2)(C)(i). Had the SEC understood that approving the direct listing would, as a practical matter, generally strip investors of their Sections 11 protections in those offerings, the Commission may well have disapproved it.

Petitioners also complain (Br. 40) that the Ninth Circuit's rule could make defendants liable to purchasers of exempt shares sold after the expiration of a voluntary IPO lockup period. That question is not presented here, but petitioners' premise – that issuers are entitled to control the scope of their Section 11 exposure by controlling when exempt shares may enter the market – was not embraced by *Barnes* and has never been accepted by this Court. Nor is there anything unfair about subjecting those responsible for a misleading registration statement to liability to all who purchased shares in the registered offering when all of those shares were made available to public based on the filing of the same registration statement. The scope of that liability is commensurate with the harm caused and is entirely foreseeable, as companies know how many extant unregistered shares are subject to potential sale after the lockup period expires.

*7. The Untenable Consequences Of Petitioners' Interpretation Are Not The Result Of Modern, Unforeseen Developments.*

As a last resort, petitioners simply shrug their shoulders and say that if their position makes a hash of the statute, the fault lies not in their interpretation but in the ways modern trading practices interact with the statute as written, ways Congress could not have foreseen in 1933. Br. 18. That suggestion has no merit either.

Although some modern developments have made it harder to prove a plaintiff purchased registered shares, the problem could have arisen on the first day the statute went into effect if a company failed to arrange a lockup restriction during an ordinary IPO. Petitioners admit that "the securities laws do not require" lockups in IPOs and point to no evidence that they were common in 1933. Br. 7. But even if they were, given issuers' intense opposition to the '33 Act's civil liability provisions, *see supra* at 6 & n.3, Congress surely would not have written the statute in a way that would allow such easy evasion of the statute's central private enforcement provisions.

## II. Section 12 Is Not Limited To Registered Shares.

Petitioners similarly argue (Br. 26) that Section 12 provides a remedy only for those who purchased "registered shares" based on a misleading prospectus. But the statute says nothing of the sort.

Section 12 states, in relevant part:

> Any person who . . . offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section) . . . by means of a prospectus . . . which includes an untrue statement of material fact . . . shall be liable . . . to the person purchasing such security from him.

15 U.S.C. § 77*l*(a)(2). Here, unlike in Section 11, "such security" has an obvious referent: the "security" sold "by means of" a misleading prospectus. And here the complaint alleges that the individual petitioners sold "a security" (their Slack shares) "by means of" a misleading prospectus (the one they caused to be drafted and filed with the SEC in order to effectuate the direct listing). J.A. 31-32, 76.

In the lower courts, petitioners contested whether they had sold any shares to respondent by means of their prospectus. Pet. App. 20a.[19] But in this Court, petitioners raise a single argument: they claim that the provision only applies to the sale of registered shares. Br. 26.[20] That argument is wrong. This Court

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[19] The district court rejected that argument, noting that this Court has held that Section 12 encompasses both passing title and "actively soliciting the sale." Pet. App. 54a (citing *Pinter v. Dahl*, 486 U.S. at 642-44). It found the complaint adequately alleged that the individual defendants had solicited the sale of the securities in the direct listing, including by preparing the prospectus and soliciting sales at an Investor Day in advance of the direct listing. *Id*. at 57a-58a.

[20] Petitioners do not dispute in this Court that they sold shares "by means of" that prospectus, but even if they did, the objection

long ago "agree[d] with the SEC that § 12[a](2) applies to every class of security (except one issued or backed by a governmental entity), *whether exempted from registration or not*." *Gustafson*, 513 U.S. at 580 (emphasis added); *see also* Thomas Lee Hazen, *Federal Securities Law* § III.E.2.a n.308 (4th ed.) ("Although the Court [in *Gustafson*] limited § 12(a)(2) to public offerings, it is not limited to registered offerings.").

1. The first obstacle to petitioners' interpretation is the plain text of the provision. The proscription against selling securities by means of a misleading prospectus applies to "*Any* person" who "offers or sells *a* security." 15 U.S.C. § 77*l*(a) (emphasis added). The words "any" and "a" signal breadth. *See, e.g.*, *Gallardo ex rel. Vassallo v. Marstiller*, 142 S. Ct. 1751, 1758 (2022). As noted earlier, Congress knew how to specify the subset of shares subject to registration. *See supra* at 23-24. Its failure to use similar language here confirms that Congress meant what it said – Section 12 applies to the misleading use of a prospectus to sell any security.

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would have no merit. The phrase "by means of" "typically indicates that the given result (the 'end') is achieved, at least in part, through the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect, and incidental." *Loughrin v. United States*, 573 U.S. 351, 363 (2014). A prospectus is, by definition, a means of selling securities. *See* 15 U.S.C. § 77b(a)(10) (defining "prospectus" as a "communication . . . which offers any security for sale"). The prospectus in this case contained information essential to the valuation of all of the shares petitioners sold, registered or exempt. And without it being filed and distributed, none of the shares could be sold under the rules for direct listings the SEC approved. *See* Pet. App. 14a.

If there were any doubt about the provision applying to exempt securities, Congress removed it by extending Section 12 to the sale of "a security (*whether or not exempted* by the provisions of section 77c . . . )." 15 U.S.C. § 77*l*(a)(2) (emphasis added). The parenthetical refers to Section 3 which, in turn, exempts certain securities from any of the Act's requirements, including the obligation to file a registration statement. *See id.* § 77c. Accordingly, the parenthetical makes clear that "a security" can include a security for which no registration statement is required. It also belies petitioners' claim (Br. 26) that the word "prospectus" refers solely to a prospectus required to be filed as part of the registration process. No such registration statement or prospectus is required to sell shares "exempt under the provisions of section 77c." Yet the parenthetical makes clear that it is nonetheless possible to sell such exempted securities "by means of a prospectus" and that doing so is subject to Section 12.[21]

2. Petitioners nonetheless contend that in *Gustafson*, 513 U.S. 561, this Court interpreted "prospectus" to preclude liability under Section 12(a)(2) "'unless there is an obligation to distribute [a] prospectus in the first place.'" Br. 26 (quoting 513 U.S.

[21] It makes no difference that the parenthetical addresses only securities exempted under Section 3 and not sales exempted under Section 4. Even though the parenthetical serves to underscore Section 12's sweep, its principal purpose is to exclude from Section 12 two specific kinds of exempt securities – those described "in paragraphs (2) and (14) of subsection (a)" of Section 3, which deal with government-issued securities and certain futures products. Because Congress did not intend any similar carveout for sales exempted under Section 4, there was no need to address that provision specifically.

at 571) (alteration in original). Because that duty "extends only to registered shares to be sold in a public offering," they reason, it "necessarily follows," that "the only shares whose sale could give rise to liability under Section 12(a)(2) are registered shares." *Ibid.* (emphasis omitted). That argument does not follow from *Gustafson* and is belied by the statute's text.

The plaintiffs in *Gustafson* alleged the defendant violated Section 12 by making misrepresentations about a company's financial condition in a contract. *See* 513 U.S. at 564-66. "The determinative question," this Court explained, "is whether the contract is a 'prospectus' as the term is used in the 1933 Act." *Id.* at 568. The Court concluded it was not. Writing for the Court, Justice Kennedy reasoned that although the statutory definition of "prospectus" was broad, read in historical and statutory context, it refers to the kind of formal prospectus whose content is dictated by Section 10 of the Act, which describes the required content for the prospectus that must be filed with a registration statement. *Id.* at 568-69. Accordingly, the Court held, "liability imposed by § 12[a](2) cannot attach unless there is an obligation to distribute the prospectus in the first place (or unless there is an exemption)." *Id.* at 571.

Petitioners notably elide the "unless there is an exemption" proviso when they quote this sentence as establishing the governing standard. *See* Br. 26. But the proviso makes clear that Section 12 would apply here even if there had been no requirement to file a prospectus because all of the offered shares were exempt. *See Gustafson*, 513 U.S. at 569 ("prospectus" includes a "document that, *absent an overriding exemption*, must include the 'information contained in the registration statement'") (quoting 15 U.S.C. § 77j(a)(1)) (emphasis added); *id.* at 579 ("[S]ecurities exempted by § 3 of the Act do not require registration, *although they are covered by § 12.*") (emphasis added).

In this case, petitioners not only would have been required to file a prospectus for the unregistered shares absent an exemption, they *did* file a prospectus that included the information required by Section 10, compelled to do so by the rules for direct listings. Respondent founds his claims on that formal filing – which was "prepared with care" after ample opportunity to conduct "due diligence" into its accuracy – not on some "casual communication between buyer and seller" or a provision in a private contract. *Gustafson*, 513 U.S. at 578.

Accordingly, the dispute is not over whether Slack's prospectus is a "prospectus." It surely is. The dispute is whether Section 12 applies to all securities sold by means of that prospectus, or only registered shares. *Gustafson* did not confront that question. Instead, the answer is found in the provision's creation of a cause of action to anyone purchasing "*a* security" sold by means of the prospectus, language that, as described, encompasses any share so sold, registered or not. 15 U.S.C. § 77*l*(a)(2) (emphasis added).

There is nothing strange about applying Section 12 when a misleading prospectus filed to authorize the sale of non-exempt shares is also used to sell otherwise identical exempt shares. A document filed for one purpose (say, a tax return) can be used for another (say, to obtain a mortgage). A law that prohibited obtaining money "by means of a false tax return" would apply to someone seeking an undeserved refund from the IRS or an unsupported mortgage from a bank. And someone trying to sell Slack shares as part of the direct listing would naturally provide prospective purchasers Slack's filed prospectus even if she knew that the some or all of the shares she was offering were unregistered.

It is understandable that Congress would prohibit that misleading use of the prospectus. Congress believed that a core cause of the Great Depression was deceptive marketing of worthless securities. *See supra* at 1. Prohibiting that deception was the bare minimum necessary to address the root causes of that economic calamity and to ensure public confidence in the equity markets. *See, e.g.*, House Report at 8. That is why Congress made absolutely clear that even with respect to securities it had exempted from *every other provision* of the Act through Section 3, Section 12's proscription against selling shares by means of a false prospectus would apply. *See supra* at 42.[22]

## III. If The Court Holds That Section 11 Or 12 Is Limited To Registered Shares, It Should Remand To Allow Further Consideration Of The Standards For Pleading And Proving Statutory Standing.

Petitioners argue that if the Court holds that Section 11 and 12 apply only to registered shares it should "remand with instructions to dismiss the complaint with prejudice." Br. 1, 48. They do not explain why, but in the district court, petitioners argued that "plaintiff cannot plead standing because

[22] Although petitioners say the SEC agrees with, and Congress has ratified, their interpretation of Section 12, they cite no SEC brief or circuit decision ever adopting their position, much less any broad consensus Congress could have ratified. *See* Br. 31-35.

. . . plaintiff's purchased shares must be traced to the defective registration statement, which is impossible to do here." Pet. App. 40a. The Court should reject that claim and instead simply resolve the question presented and, if necessary, remand for further proceedings consistent with the Court's opinion.

1. Even if this Court holds that Section 11 or 12 applies only to registered shares, it should normally be relatively simple for most plaintiffs to plead statutory standing. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true" to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This "plausibility standard" is "not akin to a 'probability requirement.'" *Ibid*. The allegations need only "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and "raise a reasonable expectation that discovery will reveal evidence" that will establish statutory standing. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 (2011) (cleaned up).

In a typical direct listing case, these standards should be met easily. Here, for example, respondent purchased 30,000 shares on the opening day, from a pool that petitioners represent to consist of more than 40% registered shares. Pet. App. 8a; Br. 9. The likelihood that he purchased no registered shares is infinitesimally small. *See supra* at 14 & n.11. To be sure, that evidence is probabilistic. But statistics are the mainstay of securities litigation, relied upon throughout the litigation to establish or disprove market efficiency, price impact, and loss causation.[23]

Some courts have expressed concern that accepting statistical evidence would mean that "every purchaser would have standing for every share," and that defendants might ultimately be held liable for every share sold, registered or not. *See, e.g.*, *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 496-97 (5th Cir. 2005); *id*. at 492 (affirming dismissal despite acknowledging that the probability the plaintiff "owned at least one share of [registered] stock was very nearly 100%"). But the precise number of actionable shares the plaintiff has purchased is a question of damages, not standing. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 114 n.9 (1969) (in an antitrust case, the "burden of proving the fact of damage" is "satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage"). And holding that statistical evidence is sufficient to establish standing at the pleading stage does not mean that such evidence would be sufficient later in the case, much less sufficient to permit an award of damages for every stock purchased, registered or not.

Adhering to traditional pleading principles is particularly important in this context because the evidence necessary to trace shares and prove standing may be in the hands of third parties – like the sellers' brokers and share depositories – who have no

[23] *See* Jill E. Fisch & Jonah B. Gelbach, *Power and Statistical Significance in Securities Fraud Litigation*, 11 Harv. Bus. L. Rev. 55, 56 (2021).

obligation to provide that information to investors absent discovery.

2. Petitioners nonetheless suggest that dismissal is appropriate because even with discovery, establishing standing will be impossible. *See* Br. 13. The Court should reject that contention as well.

Even circuits that limit Section 11 to registered shares have held in non-direct-listing cases that plaintiffs may establish standing by showing they "purchased in the offering," requiring further tracing only by "aftermarket purchasers." *Krim*, 402 F.3d at 498; *see also In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013) (same); *supra* at 36 (discussing proof in secondary offering context). In a direct listing, tracing may be more difficult, but it is not always impossible. For example, in the parallel state court litigation arising from Slack's direct listing, the plaintiffs' expert has testified that discovery has shown that tracing is possible because, among other things, "it appears that all of the 45.5 million Slack shares sold in the Opening Auction were registered."[24] Courts and the SEC have also adopted the concept of an "integrated offering" in which the simultaneous sale of registered and unregistered shares may be treated as a single integrated offering "thereby resulting in the registered transactions forfeiting their registration exemption." Brent A. Olson, 1 *Publicly Traded Corporations Handbook* § 5A:108 (2022); *see* Resp. C.A. Br. 44-45. And amici in this Court have

[24] *See* Rebuttal Report of Bjorn I. Steinholt at 6, Ex. 28 to Suppl. Decl. of Brian Danitz in Supp. of Pls.' Mot. for Class Certification, *In re Slack Techs., Inc. Shareholder Litig.*, No. 19-CIV-05370 (Cal. Super. Ct. Feb. 7, 2022).

proposed tracing methods that can be used even when registered and exempt shares retain their separate legal status while being sold in tandem. *See generally* Sec. Law & Econ. Professors Amicus Br.

Some of petitioners' amici disagree but this Court is poorly positioned in this case to decide who is right. The Court should simply leave the question for further development in the lower courts.

3. In this case, respondent agreed below that it was impossible to trace his shares to a registration statement. But since then, developments in the state court litigation against Slack and the amicus briefing in this Court have called that acknowledgment into question. The Court should remand to allow the lower courts to decide whether the concession should nonetheless bar his claims.

Moreover, respondent conceded only that *he* could not carry the burden of proving the registration status of each of his shares on his own. When faced with similar difficulties of proof in other contexts, courts have frequently developed reasonable burden-shifting regimes to enable vindication of important statutory rights. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958-59 (2021); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267-68 (2014); *cf. also Barnes*, 373 F.2d at 273 n.2 (noting possibility of shifting tracing burden). Adopting a similar scheme in this context would be particularly appropriate because petitioners' standing argument is ultimately founded in their claimed entitlement to an exemption from Section 5's registration. *See* Br. 19; *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) ("[I]mposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."). The possibility of adopting a burden-shifting scheme should be left open in any remand.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 27, 2023