No. 22-200

# In the Supreme Court of the United States

SLACK TECHNOLOGIES, LLC, *et al.*,

*Petitioners*,

v.

FIYYAZ PIRANI,

*Respondent*.

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

## MOTION FOR LEAVE TO FILE AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## MOTION FOR LEAVE TO FILE

The Chamber of Commerce of the United States of America (Chamber) and the Securities Industry and Financial Markets Association (SIFMA) respectfully request leave to file the accompanying brief as *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief. Respondent has withheld consent.

The Chamber 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 in matters 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. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021); *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042 (2017); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015).

SIFMA is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence

in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. *See, e.g.*, *Pivotal Software, Inc. v. Super. Ct. of Cal.*, No. 20-1541 (U.S. docketed May 5, 2021); *Badgerow v. Walters*, 142 S. Ct. 1310 (2022); *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020).

As explained more fully in the attached brief, the Ninth Circuit's split decision broke with a half-century's worth of case law holding that plaintiffs alleging a Section 11 claim under the Securities Act of 1933 must be able to "trace" their securities to the registration statement on which they base their claim. The Ninth Circuit's holding not only has been rejected by every court to have considered the issue, it also undermines the certainty that well-functioning capital markets require.

*Amici* have a strong interest in this case because their members are participants in capital markets or public companies with exposure to private securities actions, who depend on uniformity and predictability in the securities laws.

For these reasons, the Chamber and SIFMA respectfully request that the Court grant their motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

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## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) 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 in matters 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. The Chamber and its members have a strong interest in this case because many of the Chamber's members are public companies with exposure to private securities actions.

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job

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[1] Counsel for the parties received timely notice of *amici*'s intent to file this brief. Petitioners consented to the filing of this brief; respondent withheld consent. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 11 of the Securities Act of 1933 imposes strict liability for material misstatements or omissions in securities registration statements. 15 U.S.C. § 77k. The threat of Section 11 liability is significant, as statutory damages can range in the hundreds of millions of dollars. And even when liability does not attach, defending against Section 11 claims involves the expenditure of substantial cost, time, and energy. Securities market participants and their constituents accordingly rely on consistent application of the few pleading and proof requirements expressed in the statute—including that only purchasers of securities *actually registered* under an allegedly false or misleading registration statement have standing to sue. Since the 1960s, courts have consistently enforced this requirement by insisting that plaintiffs "trace" their securities to the registration statement on which they base their Section 11 claim. And market participants have come to rely on this consistency when assessing the risk of Section 11 liability and efficiently "pricing" that risk into capital markets transactions.

The Ninth Circuit's decision in this case—which erodes the tracing requirement by conferring standing on anyone who purchased a security "of the same nature" as a registered security, Pet. App. 10a—departs from decades of precedent by adopting a rule

that conflicts with those of every other circuit to have considered it. That sharp break dramatically undermines the certainty that capital markets require to efficiently structure future transactions. And although the Ninth Circuit's decision was made in the context of direct listings, the uncertainty engendered by the decision is not so circumscribed. The line drawn by the Ninth Circuit majority makes no logical sense, and the risk that future courts could (wrongly) apply its reasoning to further erode Section 11's statutory tracing requirement is quite real. All of this severely undermines the certainty that well-functioning capital markets need.

The Ninth Circuit majority reached this result based almost exclusively on its own policy assessment. In the Ninth Circuit's view, adhering to a rule that requires a Section 11 plaintiff to demonstrate that she bought shares registered under the allegedly misleading registration statement would result in a world in which no company "would choose to go public through a traditional [initial public offering] if it could avoid any risk of Section 11 liability by choosing a direct listing." *Id.* at 17a. Such policy concerns are found nowhere in the statutory text, which by its own terms requires a plaintiff to demonstrate that her shares were purchased pursuant to a registration statement.

But even apart from their atextual origin, the Ninth Circuit's policy concerns reflect a fundamental misunderstanding of public offerings. In practice, companies choose a method of going public to fit their business needs and standing in the market. Each of those methods offers tradeoffs when it comes to things like a company's ability to raise capital and find buyers for its shares, as well as relative cost,

complexity, and risk of loss. While the risk of Section 11 liability is certainly one factor, other considerations are significantly more important to a prospective public company's decisionmaking.

The Ninth Circuit's concern about tracing, moreover, is not unique to direct listings. De-SPAC transactions, spin-offs, and uplistings, for example, similarly make it difficult (or impossible) to trace registered shares. So if the Ninth Circuit's decision is allowed to stand, it could have serious spillover effect in a multitude of other market transactions.

In the end, the policy concerns the Ninth Circuit rested on here are unfounded or, at a minimum, must be balanced against competing considerations that ensure well-functioning securities markets. As this Court has repeatedly made clear, the weighing of costs and benefits is for the political branches—it is not a court's role to rewrite a statute based on its own weighing of "policy-talk." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). The petition should be granted and the Ninth Circuit's judgment reversed.

## ARGUMENT

### A. The Ninth Circuit's Split Decision Undermines The Certainty That Capital Markets Require

1. Securities laws prohibit the sale of any security unless the security either (i) is registered with the Securities and Exchange Commission or (ii) qualifies for an exemption from registration. *See* 15 U.S.C. §§ 77d, 77e. So when a company wants to list its stock on a public exchange for the first time in an initial public offering (IPO), it generally must register those securities with the SEC pursuant to a registration

statement. *Id.* § 77e(c). That registration statement provides required disclosures about the securities offering, and (as relevant here) Section 11 of the Securities Act of 1933 imposes strict liability for false or misleading misstatements made in the registration statement. *Id.* § 77k(a). But Section 11 also imposes a standing requirement, permitting only "person[s] acquiring such security" issued pursuant to a materially false or misleading registration statement to sue. *Id.*; *see* Pet. 7. For more than fifty years, courts have held that this language requires a Section 11 plaintiff to "trace the lineage of [her] shares" to the registration statement. *Barnes v. Osofsky*, 373 F.2d 269, 271-73 (2d Cir. 1967) (citation omitted). That is, the plaintiff must demonstrate that she purchased a newly registered share (rather than an unregistered one).

In a traditional IPO, a company agrees to sell its shares to the public through one or more securities firms (usually investment banks). *See* Pet. App. 7a. The banks act as underwriters of the offering, agreeing to purchase the shares from the offering company for a fixed price, while selling those shares to the public at a higher price, with the differential constituting part of the underwriters' compensation. *See generally* Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* ch. 2.A.2 (6th ed. May 2022 update) (describing this process, known as "firm commitment" underwriting); Pet. App. 7a. But prospective public companies frequently have existing shareholders, who hold unregistered shares in the company and who wish to take advantage of an IPO to sell their shares. *See* Pet. 8. To ensure the offering price is not undercut by the sale of cheaper, existing shares, the underwriters typically "insist on

a lock-up period, a months-long period during which existing shareholders may not sell their unregistered shares." Pet. App. 7a (citing 24 William M. Prifti et al., *Securities: Public and Private Offerings* § 4:7 (2d ed. 2021)). Because the lock-up period ensures that only registered shares are traded on the public market for a determined period of time, a buyer can be sure that any shares she purchased during that window were registered shares that can be "traced" to the registration statement for purposes of a Section 11 claim. *Id.*

By contrast, in a direct listing a "company does not issue any new shares and instead files a registration statement 'solely for the purpose of allowing existing shareholders to sell their shares'" on a public exchange. *Id.* at 8a (quoting 83 Fed. Reg. 5650, 5651 (Feb. 2, 2018)). Although many of the common shares that will be offered to the public are registered, it is not possible to register all of them. For example, other classes of stock can be converted to common stock and employees can exercise options to buy common stock prior to the direct listing. And because a direct listing involves existing shareholders selling their shares directly to the public, there are no underwriters. *Id.* For that reason, "there is no lock-up agreement restricting the sale of unregistered shares" via an exemption from registration. *Id.* Thus, "from the first day of a direct listing, both unregistered and registered shares may be available to the public." *Id.* A member of the public who purchases shares offered in a direct listing, then, cannot be sure whether any shares she purchased were registered or, instead, were sold through an exemption, and therefore cannot "trace" her shares to the registration statement. *Id.*; Pet. 8-9.

2. In the decision below, a divided panel of the Ninth Circuit held that the practical inability of plaintiffs to trace their shares to a registration statement in a direct listing justified abandoning the tracing requirement altogether. That decision broke with precedent and conflicts with the plain text of the statute, which courts have consistently read to require plaintiffs in securities actions to "trace" their purchase of securities to the challenged registration statement—whether the registration statement arose out of an underwritten IPO, a direct listing, or a follow-on or secondary offering. *See* Pet. 15-19.[2]

The Ninth Circuit decision also introduces significant uncertainty into an area where "stability and reliance are essential components of valuation and expectation for financial actors." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2055 (2017). Because tracing serves to define the class of persons who may sue under Section 11, it has become a key metric that market participants use to assess Section 11 liability risk associated with particular capital markets transactions. Market participants regularly rely on tracing rules to determine how the size of an IPO, the duration of the lock-up period following the IPO, and the conduct and timing of secondary offerings following an IPO, will impact potential Section 11 liability. And market

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[2] Companies may offer additional registered shares pursuant to a subsequent, new, or updated registration statement. Pet. App. 7a; *see also Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729 F.3d 1104, 1106 (9th Cir 2013). This is commonly known as a "follow-on" or "secondary" offering. *See* 3A Harold S. Bloomenthal & Samuel Wolff, *Securities and Federal Corporate Law* § 8:4 (2d ed. Sept. 2022 update).

participants' assessment of potential liability, in turn, contributes to the timing, size, and cost of a particular transaction—or whether to conduct the transaction at all.

The Ninth Circuit's decision injects uncertainty into the capital markets in two ways: (a) the Ninth Circuit's decision itself leads to uncertainty for market participants because of the potential for dramatically expanded and (more expensive) Section 11 liability, and (b) by creating a circuit split, the majority's decision destroys companies' and investors' ability to gauge and "price-in" potential Section 11 liability *ex ante*, because that liability will vary based on which tracing rule courts may apply.

a. The Ninth Circuit's decision will engender widespread uncertainty in capital markets because of the potential for dramatically more expansive Section 11 liability.

The majority's decision will plainly discourage companies from going public through direct listings. Under the majority's rule, a company that chooses to go public through a traditional IPO can be certain that Section 11 liability is extinguished when the six-month lock-up period ends. By contrast, if the majority is correct, companies that choose direct listings will potentially be subject to strict liability for even innocent misstatements made in the registration statement for years. Given this choice, companies will pick traditional IPOs over direct listings rather than risk being deprived of certainty about when their Section 11 liability is extinguished. That outcome discourages market innovation, by making companies less likely to adopt new methods of going public. *See* Pet. 30-31. And it prices many prospective public companies out of the markets, by

making comparatively more expensive traditional IPOs the only realistic route to go public. *See id.*

And while the majority's holding was made in the context of direct listings, there is little reason to think other courts will follow suit. The majority held 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." Pet. App. 18a (alteration in original) (quoting 15 U.S.C. § 77k(a)). In other words, the majority held that Section 11 liability is created—regardless of a plaintiff's ability to prove tracing—any time that a registration statement is necessary for trading on an exchange.

The problem with that logic is that it could justify eliminating a tracing requirement for Section 11 liability in virtually any kind of public offering. For example, although Section 11 liability is generally extinguished after the expiration of a lock-up period in a traditional IPO, *see supra* at 6, that is only true because it becomes practically infeasible to distinguish registered from unregistered shares once both are on the market. Yet, as the majority reasoned for direct listings, the unregistered shares in a traditional IPO are only able to be "sold to the public 'when the registration statement . . . became effective.'" Pet. App. 18a (alteration in original) (citation omitted). By the Ninth Circuit's reasoning, that would justify eliminating tracing in traditional IPOs too.

Likewise, in follow-on offerings in which shares are issued pursuant to multiple registration statements, *see supra* note 2, courts have generally

held that Section 11 "plaintiffs . . . need to prove that the shares they purchased came from the pool of shares [registered in the allegedly false or misleading] secondary offering, rather than from the pool of previously issued shares." *Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729 F.3d 1104, 1006 (9th Cir 2013). But in these cases, too, a potential plaintiff could argue that shares would not have traded on the market but-for the allegedly misleading registration statement. By the Ninth Circuit's rationale, that is a reason not to enforce a tracing requirement for follow-on offerings either.

Uncertainty from the Ninth Circuit's new rule is not limited to offerings by issuers either. Take, for example, SEC Rule 144, which exempts under certain circumstances the sale of unregistered securities. *See* 17 C.F.R. § 230.144. Prior to the Ninth Circuit's decision, it was well settled that these Rule 144 sales would not give rise to Section 11 liability. But the logic of the Ninth Circuit's decision ignores the distinction between registered and unregistered shares, imposing Section 11 liability for both. By blurring the line between Rule 144 sales of unregistered securities and issuer sales of registered securities, the Ninth Circuit has injected significant uncertainty into the SEC's regulatory framework regarding when unregistered sales may occur and the liability that might attach to those sales.

In short, the Ninth Circuit's reasoning threatens to upend the law not just for direct listings, but also for a wide range of previously well-settled market transactions. Uncertainty creates risk, and additional risk will make capital more costly to obtain. That hurts the investing public by, among

other things, stifling innovation that early-stage capital so often supports.

b. The Ninth Circuit's decision also creates uncertainty by creating a circuit split that scrambles market participants' ability to gauge potential Section 11 liability for public offerings. If the majority's decision is left to stand, the scope of Section 11 liability for an issuer will vary based on where a particular plaintiff chooses to file suit. And given the securities laws' "liberal" venue provisions, forum shopping will be inevitable. *Secs. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985) (citation omitted); *see* 15 U.S.C. § 77v(a).

This will make it difficult—if not impossible—for a prospective public company to predict the scope of its potential Section 11 liability when choosing whether and how to go public, and therefore to quantify the level of risk that a particular method entails. And that uncertainty will be compounded by the fact that prospective plaintiffs need not sue in federal court at all, raising the specter of additional, divergent interpretations of Section 11's tracing requirement in any state courts that follow the Ninth Circuit's lead. *Cf. Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1078 (2018) (holding that state and federal courts have concurrent jurisdiction over securities suits).

At best, companies can assume that plaintiffs will funnel any suit possible to the Ninth Circuit, and plan to allocate their capital and resources accordingly. Pet. 33. That outcome wastes companies' resources and stifles innovation by deterring companies from going public at all. The upshot is capital markets that are less vibrant, dynamic, or productive.

### B. The Ninth Circuit's Split Decision Rests On Misplaced Policy Considerations Found Neither In The Statutory Text Nor Reality

The Ninth Circuit's decision rested on the majority's assessment that adhering to the well-settled tracing rule "would create a loophole large enough to undermine the purpose of Section 11" because "it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing." Pet. App. 17a-18a. As the petition and Judge Miller's dissent persuasively explain, those policy concerns can be found nowhere in the text of the statute. *See* Pet. 15-25; Pet. App. 24a-28a (Miller, J., dissenting).

But even setting the statutory text aside, the policy considerations the Ninth Circuit identified are misplaced for other reasons.

1. For one thing, even accepting that direct listings could "avoid" Section 11 liability, the Ninth Circuit cited no support for its speculation that companies will flock to direct listings. Nor could it. Some of the most significant and anticipated public debuts of the past few years have occurred via direct listing (including Spotify, Slack, Palantir, and Coinbase), but market evidence shows that there has been no "flood" to direct listings—even though it has been known since their inception that direct listings may reduce exposure to Section 11 liability as compared to other forms of going public. In fact, there have been only 11 more direct listings since the first

direct listing (Spotify) in 2018.[3] To put that number in perspective, there have been 984 traditional IPOs[4] and 379 public listings through mergers with special purpose acquisition companies (also known as "de-SPAC transactions") over the same time period.[5] All told, *less than one percent* of companies have gone public through a direct listing—even though tracing shares in a direct listing has always been comparatively more difficult than it is for other "going public" methods. *See* Thomas Lee Hazen, *Law of Securities Regulation* § 7:21 (8th ed. May 2022 update) (discussing longstanding problem of tracing in aftermarket trading).

Those statistics reflect the fact that prospective public companies choose a mechanism for going public based on considerations like cost, complexity, ability

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[3] Deal Point Data, Direct Listings, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q-549887726 (last visited Sept. 27, 2022).

[4] Deal Point Data, IPOs, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q-1802803206 (last visited Sept. 27, 2022).

[5] Deal Point Data, de-SPACs, https://www.dealpointdata.com/rj?vb=Action.intras&app=ma&id=q-1254628961 (last visited Sept. 27, 2022). A special purpose acquisition company (SPAC) "is a publicly held investment vehicle created to merge with a private company and thereby bring it public." Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 Yale J. on Reg. 228, 235 (2022). A private company goes public through a SPAC in two stages: *First*, the SPAC itself goes public through its own IPO, raising money through the sale of its stock to fund the SPAC's acquisition of a target private company. Loss, Seligman & Paredes, *supra*, at ch. 2.A.8. *Second*, the SPAC acquires and merges with the target private company, and the merged company carries on as a public company, with its shares trading on a public exchange. *Id.*

or desire to raise capital, and risk of loss—not just Section 11 liability. To be sure, the extent of the risk of Section 11 liability is a factor that market participants "price into" the decision whether to go public through a particular mechanism. (Which is why certainty about how Section 11 works is so important to market participants in the first place. *See supra* at 7-11.) But a company that is considering going public through an IPO because it wants to raise capital by selling new shares would not be incentivized to go public through a direct listing (where typically no new capital is raised for the company at all) simply to avoid the risk of Section 11 liability.

Likewise, a company is more likely to choose a direct listing because it is cheaper and simpler than an IPO (because a direct listing lacks the add-on costs of underwriters and the like, and no new shares are issued) rather than because of a direct listing's reduced Section 11 liability. The companies that have chosen to direct list their stock have generally done so because they: (i) did not need to raise capital by offering stock;[6] (ii) desired to provide immediate liquidity to existing shareholders, including employees and early investors;[7] and (iii) preferred the

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[6] Although the NYSE and Nasdaq have approved primary direct listings, whereby issuers can raise capital by issuing new shares (*see* Pet. App. 8a n.1), no company has yet gone public in this manner.

[7] *See, e.g.*, *Nasdaq Direct Listings Offer a Different Way to Go Public with Unrestricted Liquidity and No Lock-Up Period*, Nasdaq, https://www.nasdaq.com/solutions/direct-listings (last visited Sept. 27, 2022) (noting that direct listing "provides unrestricted liquidity to existing shareholders").

more efficient price discovery and transparency that direct listings offer.[8] These significant business and practical considerations—more than the potential for avoiding Section 11 liability—are what has motivated companies to choose direct listings instead of other forms of going public. *See, e.g.*, Alexander Panish, *Spotify's Angel Investors IP-Faux: Direct Listings and the Future of Initial Public Offerings*, Fordham J. Corp. Fin. L. Blog (Apr. 19, 2018), https://news.law.fordham.edu/jcfl/2018/04/19/spotifys-ip-faux-direct-listings-and-the-future-of-initial-public-offerings/ ("Direct listings will likely be attractive to . . . tech companies who, because [of] copious amounts of venture capital, don't need to raise more cash, but do need liquidity for their shareholders."); Matt Levine, *Direct Listings Are a Thing Now*, Bloomberg (Jan. 11, 2019), https://www.bloomberg.com/opinion/articles/2019-01-11/direct-listings-are-a-thing-now ("Other tech companies considering going public won't think 'should we do that weird thing that Spotify did' but rather 'what are the pros and cons of direct listings compared to initial public offerings?'").

2. For another, the Ninth Circuit's policy concern that direct listings make proving Section 11 liability more difficult is just as true of many other mechanisms for going public.

There have always been a number of ways companies can "go public" that theoretically reduce exposure to Section 11 liability. De-SPAC transactions are a prime example. Although the

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[8] *See Choose Your Path to Public*, NYSE, https://www.nyse.com/direct-listing (last visited Sept. 27, 2022) (emphasizing the "[f]ull and equal transparency" associated with a direct listing).

SPAC files a registration statement in order to sell shares and raise funds for the acquisition of a target company, the target company itself goes public through a reverse merger that does not require filing a registration statement (and thus avoids potential Section 11 liability). *See supra* note 5. The same is true of other securities offering structures, which similarly have the practical effect of reducing Section 11 liability. For example, a company could make an additional, small offering soon after its IPO, or it could issue sets of shares under duplicate registration statements. *See Scott v. ZST Digital Networks, Inc.*, 896 F. Supp. 2d 877, 887 (C.D. Cal. 2012) (requiring tracing in this scenario). Alternatively, issuers could just eliminate the traditional IPO lock-up period. These approaches all render tracing (and thus Section 11 standing) extremely difficult.

Alternatively, a company could choose a "going public" path that would not invoke Section 11 liability at all. Corporate spin-offs are one example, where a parent company distributes stock of the business to be spun off to its stockholders to form a stand-alone, independent publicly traded company. *See* SEC Staff Legal Bulletin No. 4 ¶ 4 (Sept. 16, 1997), https://www.sec.gov/interps/legal/slbcf4.txt (noting that the spin-off company does not have to register shares of the spin-off under the Securities Act if it meets certain conditions, including the parent company providing adequate information about the spin-off to its shareholders and the trading markets). Another example is "uplistings" from over-the-counter trading markets to national exchanges like NASDAQ or the New York Stock Exchange. A third example is a "Level 2 ADR," by which a company that is public outside the United States lists its shares on a U.S.

stock exchange without raising new capital. *See* SEC, Investor Bulletin: American Depositary Receipts 2 (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf (noting that the only form needed for Level 2 ADR under the Securities Act is Form F-6).

All of these methods of going public either make proving Section 11 claims more difficult, or present no risk of Section 11 liability at all. But the Ninth Circuit's decision did not acknowledge any of this. Instead, it treated direct listings as an outlier and a "loophole" in the securities laws that only the court could fix. That premise is clearly wrong.

3. Because the Ninth Circuit's policy concerns are just as true of all of these various methods for taking a company public, there is no reason to think the Ninth Circuit's tracing reasoning will be cabined to direct listings. The decision below threatens to upend settled principles of Section 11 liability for myriad other securities markets participants.

Since 2019, for example, plaintiffs have filed 67 SPAC-related cases. *See* Stanford Law School, Securities Class Action Clearinghouse, *Current Trends in Securities Class Action Filings: SPACs*, https://securities.stanford.edu/current-trends.html#collapse2 (last visited Sept. 27, 2022). And plaintiffs in at least nine of those cases have attempted to assert a Section 11 claim.[9] The Ninth Circuit's

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[9] *See* Compl. ¶ 102, *Poirier v. Bakkt Holdings, Inc.*, No. 1:22-cv-02283 (E.D.N.Y. filed Apr. 21, 2022); Compl. ¶¶ 128-36, *Felipe v. Playstudios, Inc.*, No. 2:22-cv-01159 (D. Nev. filed July 20, 2022); Am. Compl. ¶ 110, *Hardy v. Embark Tech., Inc.*, No. 3:22-cv-02090 (N.D. Cal. filed Aug. 25, 2022); Am. Compl. ¶ 121, *In re Grab Holdings Ltd. Sec. Litig.*, No. 1:22-cv-02189 (S.D.N.Y. filed Aug. 22, 2022); Am. Compl. ¶ 391, *Parot v. Clarivate plc*,

decision below risks upending Section 11 liability for de-SPAC transactions, too, if a court were to adopt an equally broad reading that eliminates any need for a Section 11 plaintiff to trace her SPAC shares to a registration statement.

As de-SPAC lawsuits illustrate, the spillover effect from the Ninth Circuit's decision could be profound and wide-ranging. And as explained above, even in the absence of any current case outside the direct listing context, the uncertainty engendered even by the possibility of that spillover effect inflicts its own serious harm on market participants. *See supra* at 7-11.

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In the end, the policy concerns that the Ninth Circuit identified are either unfounded or, at a minimum, must be weighed against competing considerations about certainty and predictability for market participants. But that is a task for Congress, not for two judges on a Ninth Circuit panel. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528-30 (2019). This Court's review is needed to reiterate that rule and to return certainty to market transactions.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the judgment of the Ninth Circuit.

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No. 1:22-cv-00394 (E.D.N.Y. filed Aug. 8, 2022); Am. Compl. ¶ 358, *Sanchez v. Arrival SA*, No. 1:22-cv-00172 (E.D.N.Y. filed Sept. 12, 2022); Am. Compl. ¶ 333, *Jian Zhou v. Faraday Future Intelligent Elec. Inc.*, No. 2:21-cv-09914 (C.D. Cal. filed May 6, 2022); 2d Am. Compl. ¶ 124, *Stuart v. Ginkgo Bioworks Holdings, Inc.*, No. 4:21-cv-08943 (N.D. Cal. filed July 18, 2021).

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