No. 22-200

# In the Supreme Court of the United States

SLACK TECHNOLOGIES, LLC, *et al.*,

*Petitioners*,

v.

FIYYAZ PIRANI,

*Respondent*.

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

**BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**


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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 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 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.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United

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[1] 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.

States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12.9 million men and women, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

*Amici* have a strong interest in this case because many of their members are public companies with exposure to private securities actions, who depend on clear and predictable securities laws for their access to the public markets.

## 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 shares registered under the 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.

Respondent sought an exemption from this tracing requirement for direct listings, and the Ninth Circuit obliged. The decision below confers Section 11 standing on anyone who purchased a security "of the same nature" as a registered security. Pet. App. 10a. The Ninth Circuit majority reached that result based almost exclusively on its own policy assessment. Requiring a Section 11 plaintiff to demonstrate that she bought shares registered under the allegedly misleading registration statement, the majority worried, 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 *registered* shares.

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 a factor, it is just one piece of a prospective public company's decisionmaking.

And eliminating the tracing requirement would dramatically undermine the certainty that capital markets require to efficiently structure future transactions. There is no logical way to limit a diminished tracing rule only to direct listings, because the Ninth Circuit's concerns related to tracing are 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 this Court's decision may affect a multitude of other market transactions, all of which severely undermines the certainty that well-functioning capital markets need.

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 weighing those competing concerns is a task for Congress, not for the courts. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528-30 (2019). The Court should apply the statute as written and reverse.

## ARGUMENT

### A. The Ninth Circuit's Rule Rests On Misplaced Policy Considerations Found Neither In The Statutory Text Nor Reality

1. The securities laws prohibit the sale of any security unless the security either (i) is registered with the Securities and Exchange Commission (SEC) 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.

Section 11 of the Securities Act of 1933 imposes strict liability for false or misleading misstatements made in the registration statement. *Id.* § 77k(a). Section 11 also imposes a standing requirement, permitting only "person[s] acquiring such security" sold pursuant to a materially false or misleading registration statement to sue. *Id.*; *see* Pet'rs' Br. ("Br.") 5-6. For more than 50 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. *Id.* at 271-72.

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. Dec. 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* Br. 7. 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, others may be exempt from registration and therefore will not be registered. 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.*

2. For all the reasons petitioners explain, the statutory tracing requirement applies with full force to securities plaintiffs who purchased their shares in direct listings, just as it does to securities plaintiffs who purchased their shares in any other public offering. *See* Br. 19-38. The decision below rested on the Ninth Circuit 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 petitioners and Judge Miller's dissent persuasively explain, those policy concerns can be found nowhere in the text of the statute. *See* Br. 38-40; Pet. App. 24a-28a (Miller, J., dissenting).

3. Although policy concerns can never justify an atextual rule, the policy considerations the Ninth Circuit identified are misplaced for other reasons too.

a. 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." In fact, there have been only 11 more direct listings since the

first (by Spotify) in 2018.[2] To put that number in perspective, there have been 984 traditional IPOs[3] and 379 public listings through mergers with special purpose acquisition companies (also known as "de-SPAC transactions") over the same time period.[4] 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 for some other "going public" methods. *See* 2 Thomas Lee Hazen, *Law of Securities Regulation* § 7:21 (Dec. 2022 update) (discussing longstanding problem of tracing in aftermarket trading).

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

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[2] Deal Point Data, Direct Listings, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q-549887726 (last visited Jan. 26, 2023).

[3] Deal Point Data, IPOs, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q-1802803206 (last visited Jan. 26, 2023).

[4] Deal Point Data, de-SPACs, https://www.dealpointdata.com/rj?vb=Action.intras&app=ma&id=q-1254628961 (last visited Jan. 26, 2023). 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.*

desire to raise capital, and risk of loss—not just Section 11 liability. To be sure, litigation risk is a factor that market participants "price into" the decision whether to go public through a particular mechanism. 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, rather than because of a direct listing's reduced potential for Section 11 liability. (A direct listing does not have the add-on costs of underwriters and the like, and no new shares are issued.) 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;[5] (ii) wanted to provide immediate liquidity to existing shareholders, including employees and early investors;[6] and (iii) preferred the more efficient price discovery

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[5] 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.

[6] *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 Jan. 26, 2023) (noting that direct listing "provides unrestricted liquidity to existing shareholders").

and transparency that direct listings offer.[7] These significant business and practical considerations—more than the potential to avoid 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 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, Opinion, *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?'").

b. 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 are many ways companies can "go public" that theoretically reduce exposure to Section 11 liability. De-SPAC transactions are a prime example. Although the SPAC files a registration statement to

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[7] *See Choose Your Path to Public*, NYSE, https://www.nyse.com/site-search?q=choose+your+path+to+public&page=1 (last visited Jan. 26, 2023) (emphasizing the "flexibility and transparency" associated with a direct listing).

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 necessarily require filing a registration statement (and thus avoids potential Section 11 liability). *See supra* note 4. 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 implicate Section 11 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. Direct listings are neither an outlier nor a "loophole" in the securities laws that only a court can fix.

### B. Eliminating The Tracing Requirement Would Undermine The Certainty That Capital Markets Require

As this Court has explained, "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 the 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, and the conduct and timing of secondary offerings, will impact potential Section 11 liability. That assessment, in turn, contributes to the timing, size, and cost of a particular transaction—or whether to conduct the transaction at all.

Discarding the tracing requirement would engender widespread uncertainty in capital markets because of the potential for dramatically more expansive Section 11 liability in a wide variety of

contexts—from underwritten IPOs, to direct listings, to follow-on or secondary offerings.[8]

1. Eliminating tracing in direct listings would discourage companies from going public through that mechanism, as well as through any future innovations in mechanisms for public offerings. Not because such companies would be subject to the *same* risk of Section 11 liability as companies that go public through a traditional IPO—but because they would be subject to *more*, and *less predictable*, risk. That outcome discourages market innovation, by making companies less likely to adopt new methods of going public. *See* Br. 44-45 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.* at 45-46.

2. The uncertainty would not be limited to direct listings: there is simply no logical way to cabin a rule that eliminates tracing. The Ninth Circuit 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, Section 11 liability is triggered—regardless of

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[8] 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. Dec. 2022 update).

a plaintiff's ability to prove tracing—any time that a registration statement is necessary for trading on an exchange.

That logic could justify eliminating a tracing requirement for Section 11 liability in virtually any kind of public offering.

Take de-SPACs, for example. But for the SPAC's registration statement, shares of the newly public, merged company that emerges from the de-SPAC transaction would not have traded on the market. Plaintiffs therefore could use the Ninth Circuit's rationale to bring Section 11 suits for de-SPAC transactions. And that possibility is not hypothetical. Since 2019, plaintiffs have filed 73 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 Jan. 26, 2023). And plaintiffs in at least nine of those cases have attempted to assert a Section 11 claim.[9] That number would surely grow if this Court eliminated tracing in direct listings.

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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*, 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, 2022).

And de-SPAC lawsuits are only one example. The spillover effect from a decision to eliminate the tracing requirement in direct listings could be profound and wide-ranging. Even a traditional IPO would raise serious questions. Although Section 11 liability is generally extinguished after the expiration of a lock-up period, *see supra* at 5-6, that is true only 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 8, courts have generally held that Section 11 plaintiffs must demonstrate that "the[ir] security was indeed issued under [the faulty] registration statement and not another." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495-96 (5th Cir. 2005) (citation omitted). But in these cases, too, a potential plaintiff could argue that shares would not have continued to trade 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.

And these problems are not limited to offerings by issuers either. Consider SEC Rule 144, which provides a safe harbor from registration under certain circumstances for the sale of unregistered securities.

*See* 17 C.F.R. § 230.144. Previously, it was well settled that these Rule 144 sales would not give rise to Section 11 liability. But to rule for respondent in this case, this Court would *have* to ignore the distinction between registered and unregistered shares in direct listings, imposing Section 11 liability for both. And by blurring the line between Rule 144 sales of unregistered securities and issuer sales of registered securities, the Court would inject significant uncertainty into the SEC's regulatory framework regarding when unregistered sales may occur and the liability that might attach to those sales.

3. All of this uncertainty comes at significant cost for issuers and for market participants. Uncertainty creates risk, and additional risk makes capital more costly to obtain. If the Court eliminates tracing for direct listings, it 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. That outcome wastes companies' resources and stifles innovation by deterring companies from going public at all. And it hurts the investing public too. The upshot is capital markets that are less vibrant, dynamic, or productive.

## CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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