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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Cory L. Andrews
Counsel of Record
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave.
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

James N. Kramer
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5923
jkramer@orrick.com

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Washington Legal Foundation moves for leave to file the attached amicus curiae brief supporting Petitioners Slack Technologies, LLC et al.

WLF's counsel timely notified Respondent's counsel of its intent to file an amicus brief and asked if he would consent to the filing. He refused to consent.

Petitioner has consented to the filing of WLF's amicus brief.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an amicus curiae before this Court in key cases raising the proper scope of the federal securities laws. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015). WLF's Legal Studies Division routinely publishes papers by outside experts on federal securities law. *See, e.g.*, Zachary Taylor, et al., Pirani v. Slack Techs., Inc., et al.: *Ninth Circuit Cuts Securities Plaintiffs Slack on Standing*, WLF Legal Backgrounder (Mar. 25, 2022).

WLF is concerned that the decision below, by expanding the category of buyers who can expose issuers to strict liability under Section 11 of the Securities Act of 1933, not only departs from Section 11's statutory text and context, but also invites additional securities litigation filings that harm the American economy.

WLF's proposed brief provides additional discussion and citations not found in the parties' briefs. These arguments and authorities help explain why the Ninth Circuit's novel construction of Section 11 will cause great mischief and warrants this Court's review.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an amicus curiae before this Court in key cases raising the proper scope of the federal securities laws. *See, e.g.*, *Goldman Sachs Grp. Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015). WLF's Legal Studies Division routinely publishes papers by outside experts on federal securities law. *See, e.g.*, Zachary Taylor, et al., Pirani v. Slack Techs., Inc., et al.: *Ninth Circuit Cuts Securities Plaintiffs Slack on Standing*, WLF Legal Backgrounder (Mar. 25, 2022).

WLF is concerned that the decision below, by expanding the category of buyers who can expose issuers to strict liability under Section 11 of the Securities Act of 1933, not only departs from Section 11's statutory text and context, but also invites addition-

---

[1] All counsel of record received timely notice of WLF's intent to file this brief, and petitioner's counsel filed a blanket letter of consent. Respondent's counsel withheld consent and, accordingly, WLF has moved for leave to file. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

al securities litigation filings that harm the American economy.

SUMMARY OF ARGUMENT

The Petition has ably explained how the opinion below departs from the settled interpretation of Sections 11 and 12(a)(2) of the Securities Act of 1933. WLF files this brief to underscore how, in doing so, the Ninth Circuit violated fundamental separation of powers principles by adopting a policy-driven rule. This novel rule will destabilize the statutory scheme governing misrepresentations in the sale of securities and damage the American economy in concrete ways.

In Section 11 of the Securities Act, Congress created a strict liability cause of action for misrepresentations in a "registration statement" for "any person acquiring *such security*." 15 U.S.C. § 77k (emphasis added). For over fifty years, every federal appellate court applying the statute's plain text has concluded that "such security" means securities registered under the allegedly misleading registration statement (the "tracing requirement"). Courts have similarly read "such security" as used in Section 12(a)(2) of the Securities Act, which creates liability for misrepresentations "by means of a prospectus … to the person purchasing *such security*,"15 U.S.C. § 77*l*(a)(2) (emphasis added), to refer to only registered shares distributed under the allegedly misleading prospectus. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 584 (1995); 15 U.S.C. §§ 77d, 77e.

A divided Ninth Circuit panel upended this uniform, settled body of law. Contradicting the plain text of the statute, the panel majority expressly predicated its decision on policy concerns, namely that the absence of strict liability under Section 11 would incentivize companies to file overly optimistic registration statements.

In doing so, the Ninth Circuit usurped the constitutionally designated role of Congress alone to legislate—including by amending the statutory scheme. The decision below impermissibly ignores the plain text of the Securities Act and engages in open policy-based lawmaking. But the statutory text is clear and dispositive: under both Sections 11 and 12(a)(2) of the Securities Act, "such security" refers to securities registered under only the allegedly misleading registration statement or prospectus, respectively. The Ninth Circuit may not substitute its judgment for that of Congress.

What's more, Congress has repeatedly and consistently endorsed the established reading of "such securities." Presumed to know the judicial construction of statutory language, Congress "adopt[s] that interpretation when it re-enacts a statute without chang[ing it]." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). And here, Congress has amended the Securities Act dozens of times since the tracing requirement was established—including multiple amendments to both Sections 11 and 12. Yet it has never changed the "such security" language. The courts may not rewrite what Congress has left undisturbed.

Aside from departing from the statutory text, the Ninth Circuit's decision unbalances the statutory liability scheme and harms the American economy. The decision greatly expands strict liability and negligence claims that can be brought against issuers—thereby unavoidably increasing meritless litigation and imposing real-world costs, including already rising insurance rates for officers and directors of public companies. And because this rule exists only in the Ninth Circuit, it will encourage litigants to forum shop under the Securities Act's liberal venue provisions.

WLF therefore respectfully urges the Court to grant certiorari and restore uniformity to the Courts of Appeals' interpretations of these important provisions.

ARGUMENT

Review is necessary because the Ninth Circuit rewrote the meaning of "such security" within Sections 11 and 12 to dramatically expand liability—and in doing so, impermissibly infringed on Congress's constitutional role. *Infra* section I. Moreover, Congress has had ample opportunity to change the decades-old meaning of "such security." Yet despite dozens of other amendments to the statute, it has consistently declined to touch the tracing requirement. *Infra* section II. This Court's intervention is therefore necessary.

I. The Petition Should Be Granted Because the Opinion Below Constitutes Judicial Policymaking and Legislating.

The Constitution gives only Congress the power to legislate. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."). Reflecting "the confined role of the Judiciary in our system of separated powers," courts must "avoid judicial policymaking or *de facto* judicial legislation" and "respect … Congress's legislative role." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020).

The text of the statute, as enacted, controls construction. "[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court's inquiry must "begin[] with the statutory text, and end[] there as well if the text is unambiguous." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004).

For over fifty years and across seven circuits, courts have held that the text of "such security" is clear—and requires tracing. But, as Judge Miller highlighted in his dissent to the decision below, "the [majority here] never analyze[d] the [statutory] text." Pet. App. 27a; *id.* at 14a. Its consideration of the text of a New York Stock Exchange rule notwithstanding, the court below ignored this Court's dictate

that "[t]he starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

Instead, the Ninth Circuit expressly based its holding on the concern "that it would be *bad policy* for a section 11 action to be unavailable when a company goes public through a direct listing." Pet. App. 28a (emphasis added). Worried that the existing rule might "incentivize [companies] to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing … they would face no shareholder liability under Section 11," the panel majority supplanted Congress's judgment with its own to discard the longstanding tracing requirement. Pet. App. 17a. The Ninth Circuit adopted the same flawed reasoning with respect to Section 12(a)(2). *Id.* at 19a-20a.[2]

Given Congress and the courts' respective constitutional roles, however, "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021); *see also Clark v. Martinez*, 543 U.S. 371, 382 (2005) (a statute is not "a chameleon, [whose] meaning [is] subject to change"). Nor may courts re-weigh Con-

---

[2] In 1967, the plaintiffs in *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967), raised the precise policy concern that animate the Ninth Circuit here. The Second Circuit rejected the concern, confining Section 11 liability to only registered securities and establishing the tracing requirement. *Id.* at 272. For over fifty years, until now, federal courts have uniformly followed *Barnes*.

gress's balancing of policy considerations. *Harris v. McRae*, 448 U.S. 297, 326 (1980) ("In making an independent appraisal of the competing interests involved, [courts go] beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts."). These errors warrant this Court's review.

II. The Petition Should Be Granted Because Congress Has Endorsed the Tracing Requirement.

The Ninth Circuit not only opens a circuit split—which itself warrants this Court's review—but does so in an area where Congress has repeatedly ratified the longstanding construction of Sections 11 and 12(a)(2) that controls in all other circuits to consider the question.

Congress has endorsed the tracing requirement because it has been the uniform and untouched law of the land for over fifty years. *Lorillard*, 434 U.S. at 580 ("Congress is presumed to be aware of … judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *see also Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (applying the "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them"). If dissatisfied, "[i]t would be easy enough for Congress to [change the law]. But [where] Congress has not done so, … it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020).

The Second Circuit first established the tracing requirement in 1967 in *Barnes*. 373 F.2d at 270.[3] There, Judge Friendly held that Section 11's reference to "such securit[ies]" must refer to "newly registered shares." *Id.* at 271-72. Reading Section 11 to apply broadly to any shares regardless of registration "would be *inconsistent with the over-all statutory scheme*." *Id.* (emphasis added).

In the half-century since *Barnes*—until this case—courts have uniformly and consistently interpreted Section 11 to require tracing. *See, e.g.*, *In re Ariad Pharms., Inc. Sec. Litig.*, 842 F.3d 744 (1st Cir. 2016); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261 (11th Cir. 2007); *California Pub. Emps.' Ret. Sys. v. Chubb Corp.,* 394 F.3d 126, 144 (3d Cir. 2004); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003); *Joseph v. Wiles,* 223 F.3d 1155, 1158-60 (10th Cir. 2000), *abrogated on other grounds by Cal. Pub. Emps.' Ret. Sys.,* 137 S. Ct. 2042; *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976 (8th Cir. 2002); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999). Courts, including this one, have similarly applied the tracing requirement to Section 12(a)(2) for several decades. *See Gustafson*, 513 U.S. at 570-71.

---

[3] Even before *Barnes*, the Second Circuit stated that "[a] suit under Sec. 11 of the 1933 Act … may be maintained only by one who comes within a narrow class of persons i.e. those who purchase securities that are the direct subject of the prospectus and registration statement." *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 785 (2d Cir. 1951).

Congress is empowered to reject judicial interpretation of federal statutes through legislation. *See Matthew* R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317 (2014). Conversely, "congressional silence after years of judicial interpretation supports adherence to the traditional view"—*i.e.*, the interpretation consistently followed by courts across the country. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004); *see also Lorillard*, 434 U.S. at 580 ("Congress is presumed to be aware of … judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Moreover, "the force of precedent … is enhanced by Congress's amendment to the … [relevant statute following a judicial] decision, without providing any modification of [the] holding." *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended IDEA without altering the text of § 1415(i)(2)(C)(iii), it implicitly adopted that construction of the statute.").

Congress has actively amended the securities laws. Since *Barnes*, Congress has amended the federal securities laws nearly one hundred times and the Securities Act alone nearly thirty times.[4] These decades' worth of amendments range from major overhauls such as Dodd-Frank Act, Pub. L. No. 111-

[4] *See, e.g.*, 15 U.S.C. § 77a (amended 1970, 1975, 1976, 1978, 1980, 1982, 1987, 1990, 1994, 1995, 1996, 1998, 1999, 2000, 2002, 2004, 2010, 2012, 2015, 2018).

203 (2010), Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, and the JOBS Act, Pub. L. No. 112-106 (2012), to more targeted amendments. Moreover, Congress has amended both Sections 11 and 12 specifically multiples times since *Barnes*.[5]

Despite these dozens of amendments, Congress has never touched the "such security" language. Congress has thus endorsed the well-established tracing requirement. *Lorillard*, 434 U.S. at 580; *Faragher*, 524 U.S. at 792. The Ninth Circuit's unilateral upending of the established and endorsed tracing requirement thus merits this Court's intervention.

III. The Ninth Circuit's Ruling Threatens Harm to the Statutory Scheme Governing Securities Liability and to the American Economy.

The Ninth Circuit's departure from the Security Act's will upset the carefully balanced liability framework Congress created in the Securities Act and, if left to stand, will cause serious real-world harm. Now that the Ninth Circuit has adopted a rule unmoored from the statutory text, litigants can—and will—pursue claims under Sections 11 and 12(a)(2) that were previously unavailable to them. Without a tracing requirement, issuers will be exposed to strict liability for Section 11 claims that were previously available to only a statutorily man-

---

[5] *See* 15 U.S.C. § 77k (amended 1995, 1998); 15 U.S.C. § 77*l* (amended 1995, 2000).

dated subset of plaintiffs. The Ninth Circuit's erroneous decision will expose issuers to significantly expanded Section 11 strict liability. Issuers will also face expanded liability under Section 12(a)(2), which imposes negligence-based liability for misrepresentations in, among other things, a sale "by means of a prospectus" directly from the seller to the buyer. *See Gustafson*, 513 U.S. at 570-71; *Pinter v. Dahl*, 486 U.S. 622, 642-44 (1988). Such balancing is Congress's—not the judiciary's—prerogative.

Likewise, review is necessary to prevent unnecessary harm to the American economy. Currently, companies seeking capital must obtain expensive director and officer insurance to mitigate the enormous—and almost unavoidable—costs associated with any securities litigation, including extortionate suits lacking all merit. As insurance rates increase inexorably, *see* John M. Orr, *Insurance Marketplace Realities 2022 – Directors and Officers Liability* (Nov. 15, 2021), https://bit.ly/3RmdlAd, the lower court's decision will only further increase frivolous suits and exacerbate the cost to insure against these risks.

Not only does the decision below disrupt five decades' worth of consensus among the federal courts of appeals, the Security Act's liberal venue and nationwide service of process provision, 15 U.S.C. § 77v(a), virtually guarantees that plaintiffs will selectively pursue Section 11 and Section 12(a)(2) claims in the Ninth Circuit, where they can take full advantage of the Ninth Circuit's novel and unsupported Section 11 construction. This Court's review is necessary to prevent this gamesmanship.

Absent this Court's intervention, the Ninth Circuit's decision will send a highly visible, detrimental signal that lower courts may diverge from the words drafted by Congress to impose their own policy preferences. This Court should intervene.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

Cory L. Andrews
Counsel of Record
John M. Masslon II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave.
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

James N. Kramer
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5923
jkramer@orrick.com

October 3, 2022