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 BRIEF OF FORMER SEC COMMISSIONER PROFESSOR JOSEPH A. GRUNDFEST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

BORIS FELDMAN
Counsel of Record
DORU GAVRIL
DREW LIMING
OLIVIA ROSEN
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
855 Main Street
Redwood City, California 94063
(650) 618-9250
boris.feldman@freshfields.com
doru.gavril@freshfields.com
drew.liming@freshfields.com
olivia.rosen@freshfields.com

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE OF FORMER SEC COMMISSIONER PROFESSOR JOSEPH A. GRUNDFEST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2, Professor Joseph A. Grundfest respectfully moves for leave to file an *amicus curiae* brief in support of the petition for writ of certiorari in the above-captioned case.

This case interests *amicus* because Professor Grundfest is a former Commissioner of the United States Securities and Exchange Commission (1985-1990), and the William A. Franke Professor of Law and Business (Emeritus) at Stanford Law School, where he is also senior faculty of the Rock Center on Corporate Governance.[1] Professor Grundfest has published a detailed academic analysis of the tracing requirement and Section 11 liability,[2] and has taught the subject matter for decades.

Professor Grundfest's brief will aid this Court in interpreting Section 11 of the Securities Act of 1933 with a view toward maintaining uniformity among the Circuits and upholding the structure of the federal securities regime.

Amicus curiae provided counsel of record timely notice of his intent to file this brief. Petitioners' counsel consented to this motion, but Respondents' counsel declined to consent.

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[1] The views expressed herein do not necessarily reflect the views of the institutions with which *amicus* is or has been affiliated.

[2] Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 IOWA J. CORP. L. 1 (2015).

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court grant him leave to file an *amicus curiae* brief.

Respectfully submitted,

BORIS FELDMAN
Counsel of Record
DORU GAVRIL
DREW LIMING
OLIVIA ROSEN
FRESHFIELDS BRUCKHAUS DERINGER US LLP
855 Main Street
Redwood City, California 94063
(650) 618-9250
boris.feldman@freshfields.com
doru.gavril@freshfields.com
drew.liming@freshfields.com
olivia.rosen@freshfields.com

Counsel for Amicus Curiae

October 3, 2022

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Redwood City, California 94063
(650) 618-9250
boris.feldman@freshfields.com
doru.gavril@freshfields.com
drew.liming@freshfields.com
olivia.rosen@freshfields.com

Counsel for Amicus Curiae

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IPO(s)	Initial Public Offering(s)
Panel	Thomas, C.J.; Restani, J. (Ct. Int'l Trade); and Miller, J. (dissenting)
SEC	United States Securities and Exchange Commission
Securities Act	Securities Act of 1933
Slack Cert. Brief	Petition for a Writ of Certiorari, *Slack Techs., LLC et al. v. Pirani*, No. 22-200 (Aug. 31, 2022)

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is Joseph A. Grundfest, a former Commissioner of the SEC (1985-1990), and the William A. Franke Professor of Law and Business (Emeritus) at Stanford Law School, where he is also senior faculty of the Rock Center on Corporate Governance. Professor Grundfest has published a detailed academic analysis of the tracing requirement and Section 11 liability,[2] and has taught the subject matter for decades.

The views expressed herein do not necessarily reflect the views of the institutions with which *amicus* is or has been affiliated.

INTRODUCTION

Justice Kagan has observed that "we are all textualists now."[3] That "we" does not include the majority in *Pirani v. Slack Techs., Inc.*, 13 F.4th 940 (9th Cir. 2021), an opinion that does violence to the plain text of Section 11 of the Securities Act of 1933, opens a significant and consequential Circuit split, and fails to follow its own Circuit's precedent. The two-judge majority adopts a purposive approach to statutory interpretation that, if followed by other

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authorized this brief in whole or in part and that no person other than *amicus* and its undersigned counsel made a monetary contribution to its preparation or submission.

[2] Joseph A. Grundfest, *Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 IOWA J. CORP. L. 1 (2015).

[3] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

courts, would dramatically expand the scope of Section 11 liability far beyond the statutory design, even in Section 11 cases based on fact patterns that differ dramatically from those present in *Slack*.

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, is a carefully crafted express private right of action. The statutory text reflects extraordinary precision. It defines which parties are subject to strict liability for material misrepresentations and omissions in a registration statement, and which can assert a due diligence defense. *See* 15 U.S.C. §§ 77k(a)–(b). It also defines multiple forms of due diligence, each contingent on a defendant's role in an offering. *See id.* § 77k(b). The statute further articulates a negative causation damage rule and caps defendants' aggregate exposure to the total proceeds of the allegedly defective registered offering. *See id.* § 77k(e).

Significantly, the statute limits the category of plaintiffs with standing to assert Section 11 claims to purchasers of "such securities." 15 U.S.C. § 77k(a). An open market securities purchaser must therefore "trace his or her particular securities to securities sold in the registered offering. This is an unavoidable result of a statutory scheme that registers units, not classes of securities."[4] Unless a purchaser bears the burden of proving, with certainty, that their specific shares were originally covered by the allegedly

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[4] John C. Coffee, Jr., Hillary A. Sale & Charles K. Whitehead, *Securities Regulation: Cases and Materials* 981-82 & 982 nn. 43–44 (14th ed. 2020) (citing *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 286 (3d Cir. 1992); *Klein v. Comput. Devices, Inc.*, 591 F. Supp. 270, 273 n.7 (S.D.N.Y. 1984); *Guenther v. Cooper Life Scis., Inc.*, 759 F. Supp. 1437, 1439 (N.D. Cal. 1990); *Harden v. Raffensperger, Hughes & Co., Inc.*, 933 F. Supp. 763 (S.D. Ind. 1996); *Lilley v. Charren*, 936 F. Supp. 708, 715 (N.D. Cal. 1996)).

defective registration statement, the purchaser lacks Section 11 standing.

Judge Henry Friendly's 1967 opinion in *Barnes v, Osofsky*, was the first to articulate the strict tracing requirement. 373 F. 2d at 270. Every Court of Appeals to have addressed the question since, with one exception, has followed in Judge Friendly's textualist footsteps. Indeed, even when purchasers can definitively prove that the number of shares in the market that would lack Section 11 standing is infinitesimally small (the "statistical tracing" argument), all Circuit Courts have refused to recognize standing on the part of *any* stockholder because none can then satisfy the statute's strict tracing requirement.[5] The tracing requirements have, because of the statutory text, been consistently and rigorously applied. Indeed, "[i]n light of the statutory language, the Courts have rigidly enforced the tracing requirement."[6]

The one exception to the rule is the split panel decision in *Slack*, a case involving a direct listing, not a traditional underwritten offering. In a direct listing, investors and employees, but usually not the issuer, register and sell the issuer's shares directly to

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[5] *See, e.g., Krim v. pcOrder.com*, 402 F.3d 489, 496 (5th Cir. 2005) (holding that to "accept[] such 'statistical tracing' would impermissibly expand the statute's standing requirement.'"); *see also Barnes*, 373 F.2d at 271–272; *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 978 (8th Cir. 2002); *In re ARIAD Pharm. Sec. Litig.*, 842 F.3d 744, 755 (1st Cir. 2016); *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107 (9th Cir. 2013); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007); *DeMaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003).

[6] 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 7:21, at 192–93 (7th ed. 2016).

the public without an underwriter bank acting as a middleman. But in addition to shares registered in the direct listing, other employees and investors simultaneously sell entirely fungible shares that are not covered by the registration statement and that are typically exempt from registration because of the operation of SEC Rule 144. The registered and unregistered shares are commingled from the first instance of public trading in a manner that makes it impossible to trace any share to the allegedly defective registration statement.

Thus, at the moment of the initial direct offering, purchasers might either be acquiring registered shares that could support Section 11 standing, or exempt shares entering the market outside of the registration statement, which cannot support Section 11 standing. Modern electronic clearance and settlement systems, however, make it impossible to differentiate between the shares sold that were issued pursuant to the allegedly defective registration statement, and the shares sold pursuant to a valid exemption from registration.[7] Because no purchaser can then demonstrate that their shares were the ones covered by the registration statement at issue, no stockholder has a valid Section 11 claim. This conclusion is compelled by the tracing requirement as interpreted by every other Court of Appeals to have addressed the question.

Concerned that this commingling of shares makes it impossible for any purchaser in a direct listing to plead Section 11 standing, the Ninth Circuit took the unprecedented step of unilaterally expanding Section

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[7] The mechanics of the modern clearance and settlement process that make it impossible to differentiate registered from unregistered securities are explained in detail in Grundfest, *supra* note 2, at 8–20.

11 liability to cover both registered and *exempt* shares. The statute's plain text and design, however, make it abundantly clear that Section 11 liability extends only to registered shares, and that Congress never intended to attach Section 11 liability to shares that are explicitly *exempt* from registration and Section 11 liability, no matter how or when they legally enter the market.

The implications of the opinion below are not, however, limited to direct listings. The opinion's logic creates a foundation for the recognition of statistical tracing. Because a statistical tracing argument can be applied to every Section 11 claim in which even a single publicly traded share exists that was not issued pursuant to an allegedly defective registration statement, *Slack*'s reach would extend to every Section 11 claim that might be brought in the future. Notably, the Securities Act's jurisdictional provision allows plaintiffs to sue issuers anywhere in the country, thereby allowing plaintiffs to select the Ninth Circuit as their preferred forum. Indeed, if *Slack* is allowed to stand, it would dramatically alter the complexion of all Section 11 litigation, not just litigation involving direct offerings, and mark the *de facto* end of the tracing requirement.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING CREATES A SPLIT WITH ALL CIRCUITS THAT HAVE ADDRESSED THE QUESTION AND CONFLICTS WITH THE NINTH CIRCUIT'S OWN PRECEDENT

Every Circuit that has considered standing to sue under Section 11 has imposed a strict tracing requirement. *See* Slack Cert. Brief at 19 (collecting cases).[8] In fact, until the divided Panel's ruling in this action, the Ninth Circuit itself had subscribed fully to this uniform understanding of the Securities Act.[9]

This uniform tracing requirement stems from the Circuit Courts' shared understanding of the statutory text. Section 11 imposes strict liability on securities issuers if they register shares using a registration

[8] *See, e.g.*, *APA Excelsior*, 476 F.3d at 1271 (plaintiff must definitively show that "the security was issued under, and was the direct subject of, the prospectus and registration statement being challenged"); *Krim*, 402 F.3d at 497 (affirming dismissal where 0.15% of shares in the market were exempt, which prevented tracing); *DeMaria*, 318 F.3d at 176 (plaintiff must have purchased security "originally registered under the allegedly defective registration statement — so long as the security was indeed issued under *that* registration statement and not another"); *Lee*, 294 F.3d at 976–77 ("such security" means a security registered under the challenged registration statement; one must "directly trace his or her security to the allegedly defective registration statement"); *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000) (aftermarket purchaser has Section 11 standing if he can prove his securities were sold pursuant to a false registration statement); *ARIAD Pharm.*, 842 F.3d at 755 ("the plaintiff must prove that [his or] her shares were issued under the allegedly false or misleading registration statement, rather than some other registration statement") (quoting *Century Aluminum*, 729 F.3d at 1107); 2 Hazen, *supra* note 6, at 192–93.

[9] *See, e.g.*, *Century Aluminum*, 729 F.3d at 1107 (affirming dismissal where plaintiffs could not trace their shares to the relevant offering); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 n.4 (9th Cir. 1999) (tracing is required "[i]f there is a mixture of pre-registration stock and stock sold under the misleading registration statement"). *Accord In re Quarterdeck Office Sys. Sec. Litig.*, 1993 U.S. Dist. LEXIS 19806, at *9 (C.D. Cal. Sept. 30, 1993) (plaintiff unable to trace where 3% of public float were exempt shares).

statement that contains a material misrepresentation or omission. 15 U.S.C. § 77k(a). Such liability does not attach absent an actual issuance of securities under the faulty registration statement. *Century Aluminum*, 729 F.3d at 1106 (Section 11 "provides a cause of action to any person who buys a security *issued under* a materially false or misleading registration statement") (emphasis added). The statute goes on to limit the right of action to "any person acquiring such security." *Id.* at 1106 n.1. As the Second Circuit held in *Barnes v. Osofsky*, the phrase "such security" means a *registered* security. 373 F.2d at 272–73. In *Barnes*, the Second Circuit looked to Section 11's statutory scheme and legislative history to conclude that "such security" cannot mean "a security of the same nature as that issued pursuant to the registration statement," but must refer to the registered security itself. *Id.*

To give effect to the statutory text, Circuit Courts have required that plaintiffs bringing Section 11 claims plead (and ultimately prove) that their shares were indeed "such securities" registered under the faulty registration statement. As the Ninth Circuit itself explained in an earlier case, the statutory term "such security" requires that plaintiffs trace their shares to the challenged registration statement because that "is the condition Congress [] imposed for granting access to the 'relaxed liability requirements'" afforded by the statute. *Century Aluminum*, 729 F.3d at 1107.

The reasoning behind the majority view (until recently, the *unanimous* view) is simple and reflects a bedrock principle of the federal securities regime. Federal securities laws operate on the fundamental premise that a security may not be sold unless it is either registered with the SEC or subject to an exemption from such registration. The Ninth

Circuit's majority ruling in *Slack* frequently uses the term "unregistered" securities to refer to Slack shares that were sold on the stock market concomitantly with shares registered in Slack's direct listing. *See, e.g.*, *Slack*, 13 F.4th at 947 ("Thus, in a direct listing, the same registration statement makes it possible to sell both registered and unregistered shares to the public."). The Ninth Circuit's choice of words is inapt because there can be no lawful sale of unregistered securities, unless the transaction is expressly subject to an *exemption* from the registration requirement. 15 U.S.C. §§ 77d, 77e.

Thus, contrary to the Panel's opinion, the so-called "unregistered" shares are not securities that somehow get dragged along in the public marketplace by filing a registration statement. Rather, they are expressly exempt from Section 11's registration requirement and therefore from the liability that attaches to a faulty registration statement. Indeed, contrary to the Ninth Circuit's misapprehension, these securities can be, and frequently are, sold *absent* any registration statement, for example in private placement transactions that are also exempt from registration. *See infra* Section II(B). When sold in any exempt transactions, shares do not and cannot, consistent with the plain text of the statute, incur Section 11 liability. (They are, of course, subject to anti-fraud provisions that govern all securities transactions, regardless of their registration status.)

The simultaneous trading in stock markets of both registered and exempt shares makes it "often impossible" to trace a specific security back to the registration statement. *Century Aluminum*, 729 F.3d at 1107. Even then, courts, including the Ninth Circuit, have held that the tracing requirement cannot be relaxed. *Id.* Otherwise, if the standing requirement were in effect only when a plaintiff could satisfy the requirement, but was relaxed when a plaintiff could not, then the tracing requirement would be a fickle gatekeeper.

In breaking with every other Circuit, *Slack* gave the phrase "such security" a novel interpretation inconsistent with the basic framework of the federal securities regime. The Ninth Circuit's understanding of "such security" as including exempt securities eviscerates Section 11's tracing requirement and fundamentally conflicts with the reasoning of every other Circuit Court to have addressed the question.

The Ninth Circuit's claim that this is an issue of first impression simply because it concerns tracing in the context of a direct listing is transparently incorrect and fundamentally illogical. *Slack*, 13 F.4th at 946–47. The Ninth Circuit offered no logical explanation as to why the distinction between a direct listing and successive underwritten offerings matters. The Ninth Circuit did not explain why or how the fixed statutory term "such securities" has a dramatically different interpretation when applied to a direct offering than when applied to other types of offerings. The tracing challenges caused by commingling of registered and exempt shares are equally present when an issuer: (1) conducts multiple underwritten offerings; (2) conducts a traditional IPO in which an additional number of shares exempt from registration requirements quickly enter the market; or (3) engages in a direct offering. Yet, the Ninth Circuit's treatment of the third situation differs dramatically from its treatment of the first two, despite the fact that they are analytically identical scenarios governed by the same statutory text.

Indeed, when the SEC approved the regulatory structure for primary direct listings, it rejected the very argument central to the Panel's opinion. "Although it is possible that aftermarket purchases following a Primary Direct Floor Listing may present tracing challenges, this investor protection concern is not unique to Primary Direct Floor Listings, nor . . . do we expect any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the Act. . . . Primary Direct Floor Listings will provide benefits to existing and potential investors relative to firm commitment underwritten offerings." SEC Release No. 34-90768, 85 Fed. Reg. 85807, 85816 (Dec. 22, 2020).[10]

[10] To the extent the Panel feared that the only way to avoid rank lawlessness in direct listings is to expand Section 11's reach to exempt securities, it ignored numerous anti-fraud causes of action available under the federal securities laws. As the minority opinion noted, Section 10(b) of the Securities Exchange Act of 1934 provides a cause of action for shareholders who are unable to trace. *Slack*, 13 F.4th at 953 (Miller, J., dissenting). Private party plaintiffs can also bring actions under Section 12(a)(2) of the Securities Act (15 U.S.C. § 77*l*(a)(2)) and under state laws. *See, e.g.*, Ky. Rev. Stat. § 292.480(1); Va. Code Ann. § 13.1-522(A)(ii); N.C. Gen. Stat. § 78A-56(a)(2); 70 Pa. Stat. Ann. § 1-501. The SEC can also prosecute fraud in a registration statement under both Section 10(b) of the Exchange Act and Section 17 of the Securities Act. In 2021 alone, the SEC pursued 697 total enforcement actions, 22% of which concerned securities offerings. SEC Division of Enforcement, *Addendum to Division of Enforcement Press Release: FY 2021*, at 1 (Nov. 18, 2021), https://www.sec.gov/files/2021-238-addendum.pdf. Recoveries by the Commission can also be for the benefit of defrauded shareholders, and do not require scienter. *See* 15 U.S.C. § 7246(a); *Aaron v. SEC*, 446 U.S. 680, 702 (1980) (scienter need not be established "to enjoin violations of § 17 (a)(2) and § 17 (a)(3) of the [Securities] Act"). The Panel's concern that the tracing rule renders purchasers helpless in direct offering cases is incorrect.

Commingling of shares is the real impediment to tracing, and the proper solution is to address that obstacle directly, through regulation or legislation.[11] Judicial reinterpretation of a 90-year old statute to reach a conclusion that conflicts with every other Circuit that has addressed the question is not the solution.

II. THE NINTH CIRCUIT COMMITTED MULTIPLE ERRORS

In parting from the other Circuit Courts, the Ninth Circuit Panel made (at least) three critical mistakes. Each compounds the circuit split and, taken together, they upend the basis on which public offerings are subject to Securities Act Liability in the vast part of the country within the Ninth Circuit's jurisdiction.

A. The Ninth Circuit Expanded Section 11 Damages Beyond the Statutory Maximum

The Panel's opinion undermines Section 11's carefully constructed damages rule, and creates liability that can far exceed the statutory maximum. Remarkably, the Panel failed to analyze the implications of its holding for Section 11 damages.

Section 11(e) explains that damages are defined by the difference between the IPO price and later sale price. If registered shares become completely worthless, the maximum damages for each individual share cannot exceed the share's sale price, and the issuer's Section 11 liability cannot exceed the total proceeds of the offering. *See* 15 U.S.C. § 77k(g) ("In no case shall the amount recoverable under this

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[11] For examples of potential reforms, *see* Grundfest, *supra* note 2, at 64–67.

section exceed the price at which the security was offered to the public.").

By extending liability to both registered and exempt shares, the Panel's ruling multiplies the number of allegedly damaged shares beyond the number of shares included in the offering. In Slack's case, the direct listing offered 118 million shares for sale. Slack Tech., Inc. Prospectus, at i (June 20, 2019). Another 165 million shares qualified for exemptions from registration and entered the market simultaneously. *Id.* at 162. The Panel's ruling thus more than ***doubles*** Slack's Section 11 liability over a statutory maximum that is limited to the total proceeds of the registered offering. Consistent with that observation, "Section 11(e) also caps each individual underwriter's liability at the total price of the securities underwritten by it."[12]

The Ninth Circuit's ruling, however, fails even to discuss these dramatic implications of its reasoning for damage awards under Section 11 and makes absolutely no effort to reconcile its logic with the statute's plain text limitations on damage awards.

B. *Slack* Irrationally Imposed Section 11 Liability, Which is Limited to Defective Registration Statements, on Exempt Transactions That Never Require Registration Statements

Slack extends Section 11 liability for a misleading *registration* statement to securities that are expressly *exempt* from registration. This fundamental error is rooted in the unsupported assertion that: "unregistered shares sold in a direct listing are 'such

[12] Coffee, *supra* note 4, at 975.

securities' within the meaning of Section 11 because their public sale cannot occur without the only operative registration in existence." *Slack*, 13 F.4th at 947. This statement errs as a matter of law. The shares at issue are not merely *un*registered securities; they are *exempt* from registration. This key distinction allows them to be sold (to anyone) without registration, and therefore without Section 11 liability.

Section 5 of the Securities Act makes it unlawful to sell an unregistered security. 15 U.S.C. § 77e(a). Section 4(a)(1) exempts from Section 5's registration requirement all "transactions by any person other than an issuer, underwriter, or dealer." *Id.* § 77d(a)(1). To help identify sellers qualifying for this exemption, the SEC promulgated Rule 144. 17 C.F.R. § 230.144 (1972). The introductory statement to Rule 144 explains that sellers who comply with its safe harbor are deemed not to be an "underwriter" for purposes of Section 4(a)(1), and the transaction is therefore exempt from registration requirements. *See* SEC Release No. 33-5223, 37 Fed. Reg. 591, 591–92 (Jan. 14, 1972). The SEC amended Rule 144 in 2007 to expand the safe harbor provisions to allow even greater freedom in the sale of securities pursuant to this exemption. *See* SEC Release No. 33-8869, 72 Fed. Reg. 71546 (Dec. 17, 2007). Rule 144's safe harbor is thus today available both to affiliates and non-affiliates of reporting and non-reporting issuers, subject to different holding requirements, volume limitations, and availability of public information. *See generally* 17 C.F.R. § 230.144.

Rule 144 permits non-affiliates of non-reporting issuers (such as Slack), who have not been affiliates for at least three months, to sell their stock without registering the transaction. 17 C.F.R. § 230.144(b)(1)(ii).

These sales are not subject to the requirement that adequate, current information regarding the issuer be publicly available. *See id.* § 230.144(c). The only requirement is that the non-affiliate seller holds the stock for at least one year. *See id.* § 230.144(d)(1)(ii). Purchasers of these shares are not subject to any holding period requirements before they can resell the same shares.

At the time of Slack's direct listing, approximately 165 million shares could be sold by non-affiliates under this exemption. *See* Slack Tech., Inc. Prospectus, at 162. These 165 million unregistered shares legally available for sale without registration are 142% of the 118 million registered shares sold in Slack's direct listing. These 165 million exempt shares were not "sold in a direct listing" as the Ninth Circuit mistakenly stated. *Slack*, 13 F.4th at 947. These shares could, instead, have been sold to anyone, before, during, or after the direct listing, in a registered or unregistered offering.

The Ninth Circuit completely ignores the fact that this massive volume of shares was exempt from registration. By extending Section 11 liability, which requires a false registration statement, to securities expressly exempt from registration, the Ninth Circuit nullified the very purpose of the Rule 144 exemption and adopted an interpretation obviously inconsistent with plain statutory text creating exemptions from the registration requirements, and therefore also from Section 11 liability.

The Ninth Circuit's purposive interpretation is unmoored from the statutory text and upsets a judicial and regulatory framework that has governed the federal securities regime for nearly ninety years.

Compounding the problem, the Ninth Circuit failed to provide any limiting principle to its dramatic reinterpretation of the term "such security." The Ninth Circuit did not explain whether its interpretation also applies to traditional underwritten IPOs, and fails to provide a cogent rationale supporting any such distinction. The Ninth Circuit did not explain what happens when a share exempt under Rule 144 is sold not at the time of the offering, but minutes, days, weeks or months later. Or what happens when a share that does not even qualify for the Rule 144 exemption until months after the offering (and therefore could *not* have traded when the registration statement was filed) is sold. The Ninth Circuit did not explain what happens if an issuer files multiple registration statements, only one of which is allegedly false, and an exempt share is sold after the filing of the latest, correct registration statement. Nor did the Ninth Circuit address situations in which shares become exempt (and thus available for sale) at the time of the allegedly false registration statement, but the non-affiliate third party does not sell until after a correct registration statement is filed. The range of scenarios that the Ninth Circuit failed to address is almost endless, and highlights that its *ad hoc* purposive interpretation of the statue creates a hornets' nest of issues that have no ready or rational resolution given the Panel's interpretation of Section 11, and is untethered from any limiting principle.

C. *Slack's* Faux-Textualism Disguises a Purposive Interpretation That, Followed by Other Courts, Would Dramatically Expand Section 11 Liability

The majority in *Slack* claims that its approach "look[s] directly to the text of Section 11 and the words 'such security.'" *Slack*, 13 F.4th at 947. Not so. *Slack* cloaks a purposive analysis in the mantle of textualism, and its effort fails on its face. Such faux-textualism is merely purposivism in disguise.

As an initial matter, the majority fails entirely to address the implications of its analysis for the operation of the statutory damage rule. Because the grant of standing to all purchasers in this direct offering more than doubles the issuer's Section 11 exposure beyond the statutory maximum, it is impossible to assert that the Panel's conclusion is consistent with the statutory text. The opinion nowhere addresses this contradiction because there is no solution to this contradiction. An interpretation of a statute cannot be respected as textualist, regardless of a court's assertions, if it ignores or contradicts central portions of the text, as is here the case.

The argument that "Slack's unregistered shares sold in a direct listing are 'such securities' . . . because their public sale cannot occur without the only operative registration in existence" makes no sense because the same is true of the public sale of every exempt security that enters the market. *Slack*, 13 F.4th at 947. In modern publicly traded markets, every unregistered, exempt share is available for sale in the public market only because some share, at some point in time, was registered with the SEC. The Panel thus relies on a distinction that makes no difference. Indeed, if the Panel's analysis is correct, then the entire tracing doctrine should be abandoned because no share is ever sold on the public markets without an operative registration statement having been in existence. By this logic, every share is then "such security" and there is no need to trace. The Panel thus proves too much, and again in a manner directly inconsistent with plain text.

The effort to distinguish *Slack*'s facts from the tracing precedent by observing that "this case involves only one registration statement" is yet another *non-sequitur*. *Slack*, 13 F.4th at 947. The tracing problem arises irrespective of the number of registration statements an issuer might have filed with the Commission. Whether the issuer has one or a dozen registration statements on file is irrelevant. The tracing problem exists primarily because exempt and registered shares are commingled in a manner such that, once a single exempt share enters the market, it becomes impossible to differentiate securities issued pursuant to an allegedly defective registration statement from exempt securities that legally entered the market without any need for registration. Counting the number of registration statements introduces a red herring into the analysis. This again is not textualism.

The Panel's true concern is not with an authentic textualist interpretation, but that textualism would "create a loophole large enough to undermine the *purpose* of Section 11 as it has been understood since its inception." *Slack*, 13 F.4th at 948 (emphasis added). This effort to further the Panel's view of the purpose of the statute, as opposed to its text, is purposivism plain and simple, and animates the Panel's faux-textualist analysis. As the late Justice Scalia explained, "[i]f any interpretive method deserves to be labeled as an ideological 'device,' it is not textualism, but competing methodologies such as purposivism and consequentialism, by which the words and implications of text are replaced with abstractly conceived 'purposes' or interpreted-desired 'consequences.'"[13]

The Panel's efforts to cloak its purposive analysis in the guise of textualism must fail. Indeed, if the Panel's interpretation of the statute is allowed to stand, then *Slack*'s implications for all Section 11 litigation, and not just cases involving direct offerings, are profound.

CONCLUSION

The Ninth Circuit's interpretation of the phrase "such security" is inconsistent with the Securities Act's text, and creates an unprecedented and profound Circuit split. This Court should grant *certiorari* to heal this divide and correct the Ninth Circuit's multiple errors.

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[13] Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* 16-17 (2012).

Respectfully submitted,

BORIS FELDMAN
Counsel of Record
DORU GAVRIL
DREW LIMING
OLIVIA ROSEN
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
855 Main Street
Redwood City, California 94063
(650) 618-9250
boris.feldman@freshfields.com
doru.gavril@freshfields.com
drew.liming@freshfields.com
olivia.rosen@freshfields.com

Counsel for Amicus Curiae

October 3, 2022