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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure statement included in the petition remains accurate.

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INTRODUCTION

The briefs of respondent and the supporting investor amici underscore why this Court should grant Slack's petition.

There is a direct conflict between the decision below and the decisions of seven other circuits. Although courts have for decades held that plaintiffs may sue under Section 11 only if they bought registered shares, the Ninth Circuit dispensed with that requirement. Respondent says there is no conflict because in the other cases registered and unregistered shares did not become available for trading on an exchange at exactly the same time. But he never explains why that distinction makes any difference. Nor could he. The problem in this case is the same as in every other: Because only some of the available shares were registered, the plaintiff cannot say whether he bought registered or unregistered shares. If the Ninth Circuit had applied the same legal rule that other circuits have consistently applied, it would have dismissed respondent's claims.

Respondent defends that decision on the theory that the phrase "such security" refers to any security of the same "nature and type," whether registered or unregistered. Opp. 23. But that is the same reading of the statute that Judge Friendly rejected 55 years ago in *Barnes*, the leading case on the scope of Section 11.

Apart from his unsuccessful efforts to deny the existence of a circuit conflict, respondent says the decision below is in any event a narrow one that concerns only direct listings. But respondent himself repeatedly contends that the tracing requirement applies only when there are multiple registration statements,

and is inapplicable when there is only one. On that theory, which the court below adopted, plaintiffs could also maintain Section 11 claims in initial public offering (IPO) cases even after unregistered shares enter the market, so long as the company has not conducted a secondary offering involving a second registration statement. The Ninth Circuit's decision therefore amounts to a radical expansion of Section 11 liability.

The Court should grant the petition to resolve the conflict among the courts of appeals and decide who may sue under Sections 11 and 12 of the Securities Act.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

For decades, courts of appeals have consistently held that the phrase "such security" in Section 11 of the Securities Act means a security registered under the registration statement challenged by the plaintiff as misleading. Pet. 15-19. The Ninth Circuit departed from that longstanding consensus here, holding that respondent may bring a Section 11 claim even though he cannot plead that he bought registered shares. Pet. 19-23.

In an effort to dismiss that lopsided circuit split, respondent rewrites the cases on both sides of the divide. The courts on the other side, he says, "have required traceability *only* in cases involving multiple offerings." Opp. 24. That argument is wrong: Courts have required plaintiffs to prove they bought shares registered under the challenged registration statement in *all* Section 11 cases, not just those involving multiple registration statements. In *Krim v.*

pcOrder.com, Inc., the Fifth Circuit affirmed the dismissal of a Section 11 claim asserted by a plaintiff who had bought shares when there was only *one* registration statement in effect. 402 F.3d 489, 492, 496-97 (5th Cir. 2005). Just as in this case, the "intermingling" of registered shares and unregistered "insider shares" made it impossible for that plaintiff to prove that he bought registered shares. *Id.* at 492; *see also id.* at 497 (explaining that *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003), is not to the contrary, because there "all shares in the market" were registered).

More generally, as *Krim* conclusively demonstrates, "nothing in the reasoning" of other Section 11 cases "suggests that the distinction" between successive-registration cases and single-registration cases "should matter." Pet. App. 26a (Miller, J., dissenting). Contrary to respondent's argument, Judge Friendly did not adopt a "judge-made tracing rule" in *Barnes v. Osofsky*. Opp. 18. He instead interpreted "such securit[ies]" to mean "newly registered shares." 373 F.2d 269, 271 (2d Cir. 1967). Other courts of appeals all adopted the same interpretation of the statute—until this case. Pet. 15-19.

Respondent's argument only underscores the conflict. He insists the statutory text can—and in this case does—refer to shares of "the same type and class" as registered shares. Opp. 1; *accord id.* at 4, 10, 17, 23. All that matters, according to respondent, is the "nature and type of security that is being sold, not any specific shares registered under any particular registration statement." Opp. 23. But that is precisely the reading of the statute that the Second Circuit rejected more than 50 years ago. That court *declined* to read "such security" to mean "'a security of the same nature

as that issued pursuant to the registration statement.'" *Barnes*, 373 F.2d at 271. That "broader reading would be inconsistent with the over-all statutory scheme," which repeatedly makes clear it applies solely to registered shares. *Id.* at 272.

Not content with rewriting the cases on the other side of the conflict, respondent also rewrites the decision below. He contends that this case is different from the rest because it "involves a matter of first impression—how to construe Section 11's 'such security' in the context of a direct listing." Opp. 17. And because this case's supposedly novel facts purportedly require a novel legal rule, respondent tries to construct one from other provisions in the Securities Act, snippets of legislative history, and the general remedial purpose of the securities laws. *E.g.*, Opp. 18-23. But the court below rejected that good-for-this-context-only approach to statutory interpretation, making clear that its interpretation of "such security" would apply in *all* contexts. *See* Pet. App. 13a-14a ("The words of a statute do not morph because of the facts to which they are applied"). The mere fact that this case happens to involve a direct listing does not resolve the conflict.

Respondent also suggests that there is no conflict because "the Ninth Circuit's decision is limited to circumstances where an offering includes only *one* registration statement *and* the *simultaneous* release of registered and unregistered shares." Opp. 29. But he never explains how that purported distinction could make a difference, either to the decision below or to the cases on the other side of the conflict. Nor could he. In *Krim*, for example, unregistered shares entered the market within a few months of the IPO. 402 F.3d at 491-92. Here, registered and unregistered shares

became tradeable on an exchange at the same time. In each case, the *fact* that registered and unregistered shares were trading on the open market made it impossible for the plaintiff to plead that he had bought registered shares; the *timing* of when they entered the market was irrelevant. *Id.* at 492; Pet. App. 23a-24a (Miller, J., dissenting). Yet the Fifth Circuit decided that the availability of both registered and unregistered shares required dismissal; the Ninth Circuit held the opposite. That is a square conflict.

It is entirely unsurprising that neither decision turned on timing: Respondent's effort to save the decision below sets up an arbitrary standard. As he sees it, any gap between an IPO and the public trading of unregistered shares, no matter how small, should defeat a Section 11 claim. But if registered and unregistered shares become tradeable at the same time, all bets are off. The investor amici who oppose review echo this standard, saying there is no reason why issuers could not go public through IPOs with shorter lockup periods. Investor Br. 17-18. Neither respondent nor his amici explain why there is any legal difference, rooted in the statutory text or anything else, between a very short lockup period and no lockup. The only explanation for their proposal of a simultaneity standard is that it papers over the otherwise obvious conflict between this case and the decisions of other courts.

Respondent's brief therefore only underscores the deep divide between the Ninth Circuit and every other circuit to decide the question presented. Respondent treats the issue as a novel one that can be resolved mostly by reference to the general "policy" or "purpose" of the securities laws—which he invokes over and over again, Opp. 14, 15, 18-19, 21, 28-29, 30-31;

accord Investor Br. 4-5, 8, 11, 13, 14-16. That would be bad statutory interpretation even if the question were not already settled, because "it is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up). Other courts of appeals, starting with the Second Circuit, did not follow that mistaken approach and adopt respondent's theory. The Ninth Circuit did.

Finally, in a last-ditch effort to justify the Ninth Circuit's departure from other courts of appeals, respondent says that the SEC blessed his reading of Section 11. Opp. 3, 12, 21. The SEC has done no such thing. It merely acknowledged the fact of the district court's decision in this case, even as it also explained that tracing will remain difficult whenever there are "concurrent registered and unregistered sales of the same class of security"—which is the case here. Order Modifying Provisions Relating to Direct Listings, 85 Fed. Reg. 54,454, 54,461 (Sept. 1, 2020).

II. THE DECISION BELOW ALSO CONFLICTS WITH THIS COURT'S DECISIONS.

In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court explained the architecture of the securities laws. Section 11 of the Securities Act limits the class of those who can sue (only those who bought "a registered security"), but gives that group the benefit of "virtually absolute" liability, "even for innocent misstatements." *Id.* at 381-82. Section 10 of the Securities Exchange Act, by contrast, authorizes suit by the buyer or seller of "'*any* security,'" but requires the plaintiff to prove fraud. *Id.* In other words, would-be plaintiffs must choose between a difficult-to-

satisfy statutory-standing requirement or a heavier burden of proof.

Although respondent dismisses this Court's discussion of Section 11 as dicta, *see* Opp. 27, the basic distinction between Sections 10 and 11 was central to the Court's conclusion that there is no "exception to Section 10(b) for fraud occurring in a registration statement," *Herman & MacLean*, 459 U.S. at 382. "[T]he two provisions involve distinct causes of action and were intended to address different types of wrongdoing," and thus can coexist without conflict. *Id.* at 381. But if the Ninth Circuit were correct that a Section 11 action need *not* "be brought by a purchaser of a registered security," *id.* at 382, the distinction between the two causes of action would collapse, and no plaintiff would take on the heavier burden of proof by bringing a Section 10(b) claim.

And the very fact that this Court in *Herman & MacLean* used "registered security" and "security issued pursuant to a registration statement" interchangeably, Opp. 28 (citing 459 U.S. at 381-82), supports *petitioners*. It shows that this Court understood that although the courts of appeals may use different "verbal formulations," they were always making the "*same* point—that the words 'such security' in Section 11 mean that plaintiffs must prove they bought shares registered under the challenged registration statement." Pet. 19. That is why *Krim* cited *Herman & MacLean* for the proposition that Section 11 offers "expansive" liability only to that "'narrow class of persons'" who "'purchased a security issued pursuant to a registration statement.'" 402 F.3d at 495 & n.26; *contra* Opp. 27 ("none of the classic tracing cases relied on *Herman & MacLean* to interpret the phrase" "such security").

The decision below is also inconsistent with *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), where this Court held that Section 12 applies only in cases where the issuer was required to issue a prospectus—that is, only in connection with registered shares. *Id.* at 570-71. Respondent again says this Court did not address the question presented here in *Gustafson*. Opp. 27-28. Nevertheless, as Judge Miller correctly concluded, the consequence of the holding in *Gustafson* is that Section 12 requires plaintiffs to plead they bought *registered* shares in a public offering. Pet. App. 29a.

To be sure, respondent is correct that the question presented here has not been squarely resolved in one of this Court's decisions. That is precisely why the Ninth Circuit was able to break with seven other circuits, necessitating this Court's review.

III. THE PETITION PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION.

Respondent can scarcely deny the importance of the question presented. After all, "eleven institutional investors" that "collectively manage assets totaling $35.5 trillion" and that frequently serve as plaintiffs in securities lawsuits filed an amicus brief to emphasize the "critical" importance of the proper interpretation of Section 11. Investor Br. 1. Nonetheless, respondent and his amici attempt to minimize that exceptionally important issue by cabining the decision below to the context of direct listings.

The Ninth Circuit's decision cannot be limited in that fashion. It held that there can be Section 11 liability *whenever* a registration statement "makes it possible to sell both registered and unregistered shares to the public." Pet. App. 14a-15a. That is true not only of a direct listing, but also of an IPO after the

lockup expires. The registration statement makes it possible for unregistered shares to be sold on an exchange alongside registered ones, and buyers will have no idea which they have bought.

Petitioners are not the only ones to point out that post-lockup IPOs present the same tracing problem as direct listings. In a recent order addressing direct listings, the SEC explained that shareholders "may face difficulty tracing their shares back to the registration statement whenever a company conducts a registered offering for less than all of its shares," "even in the context of traditional . . . offerings"—namely, IPOs. Order Modifying Provisions Relating to Direct Listings, 85 Fed. Reg. at 54,461. Market participants and their lawyers have made the same point. For example, respondent cites an article highlighting the difficulty of satisfying "Section 11's tracing requirement in 'mixed market' situations, 'where registered and unregistered shares are commingled in the market.'" Opp. 11-12. But he neglects to mention that the very same sentence of the article defined "'mixed market' situations" to include the time "after the expiration of an IPO lockup." Andrew Clubok et al., *Complex and Novel Section 11 Liability Issues of Direct Listings*, Corporate Counsel (Dec. 20, 2019), https://bit.ly/3fQSBny.

Ultimately, respondent is forced to concede implicitly that the decision below will affect traditional IPOs. Again and again, he says that the longstanding rule that a would-be Section 11 plaintiff must prove that he bought registered shares applies *only* in successive-registration cases. *See*, *e.g.*, Opp. 18 ("the judge-made tracing rule . . . arose solely to address situations involving successive registration

statements"); *id.* at 24 ("courts have required traceability *only* in cases involving multiple offerings"). And, he insists, the Ninth Circuit "found that because there was only one registration statement, the judge-made traceability problem identified by courts where there are successive registration statements was not applicable." Opp. 15.

Even on respondent's telling, therefore, this is not just a direct-listing case. The Ninth Circuit's decision implicates the scope of Sections 11 and 12 for *all* methods of going public, and will apply whenever unregistered shares enter the market by virtue of the existence of a registration statement. *See*, *e.g.*, Grundfest Br. 15-18. For that reason, the decision threatens a broad expansion of Securities Act liability.

Respondent's other attempts to minimize the importance of the question presented fare no better. For example, respondent says no one should worry about the strict-liability Section 11 overtaking the difficult-to-satisfy Section 10, because plaintiffs have sometimes chosen to assert claims under both statutes. Opp. 31. But the Ninth Circuit's decision eliminates the tradeoff Congress enacted: No future plaintiff would choose to shoulder the heavier burden of proof under Section 10 if she has standing to sue under Section 11.

Respondent also points out that there have been few direct listings and plenty of IPOs in recent years. Opp. 32-33. But that is exactly the problem. Uncertainty about the scope of potential liability will dissuade some issuers from choosing novel methods of going public, including direct listings, and it will dissuade others from going public at all. *See* Cato Br. 8-14. Thus, the decision below will discourage

innovation in the capital markets and deter companies from going public in new ways. Pet. 30-31.

And that uncertainty will inevitably spill over into litigation. There is a strong presumption in securities law in favor of certainty and uniformity. Other courts of appeals have made deliberate efforts to craft rules that are clear and predictable—to "make[] clear the boundary between" lawful and unlawful conduct. *Affco Invs. 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 195 (5th Cir. 2010). The Ninth Circuit's decision has the opposite effect, creating uncertainty about when issuers, executives, and directors might be liable—and their insurers indirectly on the hook—for even innocent misstatements made in a registration statement or prospectus.

In short, the Ninth Circuit placed a thumb on the scale against direct listings and other novel methods of going public, and it also cast doubt on market participants' common understanding of the limits of Section 11 liability in connection with IPOs. The decision below will meaningfully alter the behavior of market participants and encourage litigation over questions long thought settled.

* * *

Respondent does not dispute that the question presented is purely legal and case dispositive. Nor does he dispute that the Securities Act's generous venue and service-of-process provisions will allow securities class action lawyers to bring future Section 11 and 12 claims in courts within the Ninth Circuit. Pet. 32-33. Instead, he suggests that because some of those cases might be transferred elsewhere, this Court should await "further analysis by other district and circuit courts." Opp. 34-35. But this Court should

not let the Ninth Circuit's mischief and market disruption continue. It should decide the exceptionally important question now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 21, 2022