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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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). And 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 Sections 11 and 12 of the Securities Act of 1933, not only departs from the statutory text and context, but also invites additional securities litigation that harms the American economy.

SUMMARY OF ARGUMENT

In Section 11 of the Securities Act, Congress created

[1] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief.

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. § 77l(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 by holding that Pirani had standing to bring a claim under Sections 11 and 12 even though he could not determine whether he had purchased registered or unregistered shares. Contradicting the plain text of the statute and relying instead on a New York Stock Exchange rule, the panel majority justified 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 Congress's exclusive, constitutionally designated role to legislate—including by amending the statutory scheme. The decision below impermissibly ignores the plain text of the Securities Act and openly engages in brazen policymaking. But Congress's 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 the allegedly misleading registration statement or prospectus, respectively. The Ninth Circuit may not substitute its judgment for that of Congress.

What is 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 courts established the tracing requirement—including multiple amendments to both Sections 11 and 12. Yet it has never changed the "such security" language. Furthermore, with each amendment, Congress has also left in place the same administrative interpretation from the Securities and Exchange Commission. The Ninth Circuit thus erred by rewriting what Congress has left undisturbed.

Lastly, the opinion below discourages innovation in the capital markets by making companies less likely to pursue direct listings or to go public in general. Direct listings are an innovative method of going public that reduce transaction costs and enhance access for public investors. By drastically expanding liability for issuers and upending decades of precedent, the Ninth Circuit's decision increases uncertainty and risk for companies considering going public through a direct listing. The increased transaction costs of

going public will harm the capital markets and the investing public.

ARGUMENT

I. The Ninth Circuit's Opinion Constitutes Judicial Legislating and Disrupts the Settled Understanding of Section 11 and Section 12(a)(2) Standing.

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 role of the federal judiciary is thus to interpret the law, not rewrite it.

For that reason, this Court instructs that the text of the statute as enacted controls. "[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). A 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). The court below departed from that well-settled canon of statutory interpretation.

A. Lower Federal Courts Have Consistently Interpreted Section 11's Tracing Requirement.

By expanding the category of buyers who can expose issuers to strict liability under Section 11 of the Securities Act of 1933, the decision below departs from Section 11's statutory text. Section 11 of the Securities Act of 1933 states in relevant part:

> In case any part of the *registration statement*, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring *such security* . . . may [sue], either at law or in equity, in any court of competent jurisdiction[.]

15 U.S.C. § 77k(a) (emphases added).

Section 11's text explicitly limits the right to sue to one who has purchased a security offered under an allegedly defective registration statement: the antecedent refers to "registration statement," so "such" means "that or those" shares "having just been mentioned" in the preceding "registration statement." *See* Black's Law Dictionary 1661 (10th ed. 2014) (defining "such," in part, as "[t]hat or those; having just been mentioned"). Every court to have considered this issue, until the decision below, has agreed with that unambiguous reading of Section 11. *See, e.g.*, *Lee v. Ernst & Young, LLP*, 294 F.3d 969,

976–77 (8th Cir. 2002) ("[W]e read § 11's plain language to state unambiguously that a cause of action exists for any person who purchased a security that was originally registered under the allegedly defective registration statement—so long as the security was indeed issued under *that* registration statement and not another.").

For over fifty years and across seven circuits, courts have consistently held that Section 11's "such security" is clear—for plaintiffs to have Section 11 standing, they must plead and prove they purchased shares registered under the registration statement they claim is misleading. As the Fifth Circuit explained, "turn[ing] first to the language of the statute," Section 11's "standing provisions limit putative plaintiffs to the 'narrow class of persons' consisting of 'those who purchase securities that are the direct subject of the prospectus and registration statement.'" *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495 (5th Cir. 2005) (quoting *Barnes*, 373 F.2d at 273). "In limiting those who can sue to 'any person acquiring such security,' Congress *specifically* conferred standing on a subset of security owners." *Id.* at 497 (emphasis added). Over the past half century, this "tracing" requirement has been adopted by every court of appeals to have considered the issue—including the Ninth Circuit.[2]

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[2] *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

Despite that consensus, the opinion below never analyzed the statutory text. Pet. App. 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, as the dissent points out, the majority 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). Speculating 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 majority supplanted Congress's judgment with its own to discard the long-standing tracing requirement. Pet. App. 17a. The Ninth Circuit adopted the same flawed reasoning when construing Section 12(a)(2). *Id.* at 19a–20a.

Given Congress's 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 Congress's

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F.3d 1155, 1158–60 (10th Cir. 2000), abrogated on other grounds by *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 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).

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."). Despite that clear constitutional command, the Ninth Circuit usurped Congress's role by rewriting the text of Section 11 based on its own policy concerns.

B. Congress Has Ratified Section 11's and Section 12(a)(2)'s Tracing Requirements.

The Ninth Circuit not only usurped Congress's legislative role in the face of clear statutory text, it did so in an area where Congress has repeatedly ratified the long-standing construction of Sections 11 and 12(a)(2) that has been the uniform and untouched law of the land for over fifty years.

Congress may 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"—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 reenacts a statute without change."); *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"). Indeed, "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, 243 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."). 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 confirmed 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 271–2. Judge Friendly considered and rejected a broader reading of Section 11's "such securities" language, reasoning that to apply the provision's text broadly to any shares regardless of registration "would be *inconsistent with the over-all statutory scheme*." *Id.* (emphasis added).

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[3] Even before *Barnes*, the Second Circuit recognized 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, 786 (2d Cir. 1951).

In the half-century since *Barnes*—until this case—courts have uniformly and consistently interpreted Section 11 to require tracing. *See supra* n.2.

What is more, this Court recognized the tracing requirement in Section 12. In *Gustafson*, this Court explained that Section 12 liability "cannot attach unless there is an obligation to distribute the prospectus in the first place," that is, in connection with a "public offering." 513 U.S. at 570–71. This obligation to distribute a prospectus applies only to registered shares. 15 U.S.C. §§ 77d, 77e. Since *Gustafson*, lower federal courts have dutifully followed this Court's reasoning. *See, e.g.*, *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 898 (4th Cir. 2014); *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 141 (2d Cir. 2013).

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 to more targeted amendments. Moreover, Congress specifically has amended both Sections 11 and 12 multiple times since *Barnes*.[5] But despite these dozens of amendments, Congress has never touched the "such security" language.

Consider the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Through that

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[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).

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

legislation, Congress overrode President Clinton's veto to enact the most comprehensive changes to the federal securities laws since their inception. The PSLRA added novel procedural requirements for class actions brought under the Securities Act of 1933 and the Securities and Exchange Act of 1934. *See* 15 U.S.C. §§ 77z-1, 78u-4. Further, it amended the pleading requirements in the Exchange Act to require that plaintiffs plead scienter and plead misleading statements with specificity. *Id.* § 78u-4(b)(1)-(2). Yet Congress left intact the pleading requirements under the Securities Act, leaving the elements of Sections 11 and 12(a)(2) claims as they were in 1933.

By the time of the PSLRA's passage, courts of appeals had already interpreted Section 11 to require tracing. *See, e.g.*, *Barnes*, 373 F.2d at 273; *Fischman*, 188 F.2d at 785. And this Court had already interpreted Section 12(a)(2) to require tracing. *Gustafson*, 513 U.S. at 584; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983) ("Section 11 … allows purchasers of a *registered security* to sue." (emphasis added)). Even after the passage of the PSLRA, Congress further overhauled the securities laws, including the Dodd-Frank Act, Pub. L. No. 111-203 (2010), the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, and the JOBS Act, Pub. L. No. 112-106 (2012). Yet none of those enactments amended the "such securities" language in Section 11 or 12. This flurry of legislation occurred against the backdrop of the ever-growing consensus for the tracing requirement among the courts of appeals. *See supra* n.2.

Additionally, each time Congress revisited the securities laws, it left in place the administrative

consensus from the agency tasked with enforcing the federal securities laws and protecting investors—the SEC. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'" (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)).

The SEC's amicus brief in *Barnes* advocated for the same interpretation of Section 11 rejected by the decision below. In *Barnes*, the SEC argued that recovery under Section 11 is limited to persons who acquire shares actually registered. Br. for the SEC as Amicus Curiae Supporting Appellees, *Barnes v. Osofsky*, 373 F.2d 269 (2nd Cir. 1967) (No. 30867-69). The SEC pointed to Section 11's legislative history, noting that the relevant House Report states: "Fundamentally, these sections [11 and 12] entitle the buyer of securities *sold upon a registration statement* including an untrue statement or omission of material fact, to sue for recovery of his purchase price, or for damages not exceeding such price, those who have participated in such distribution." *Id.* at 5–6 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933) (emphasis added)). Further, "[t]he predecessor to Section 11 in earlier bills which created a presumption of reliance upon the registration statement . . . specifically referred to 'every person acquiring any securities specified in such statement' and to 'any persons acquiring any securities to which such statement relates.'" *Id.* at 6. The SEC explained that while the term

"securities" could conceivably refer to a "class" of securities, "there is no suggestion that such a broad construction was intended. Indeed, in other provisions of the federal securities laws where Congress sought to refer to an entire class of securities, it expressly said so." *Id.* (citing 15 U.S.C. 78l(g), 78o(d), and 78p(a), which specifically refer to a "class" of security).

The SEC also contended that the limitation on the class of persons entitled to recover under Section 11 is implicit in the statute's structure. *Id.* at 4. Section 11(e) restricts damages to the difference between the purchase price of the security (not exceeding the offering price) and its value at the time of suit or, if disposed of before suit, the sale price. *Id.* Section 11(g) further provides: "In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public." *Id.* As the SEC pointed out, if relief under Section 11 were extended to persons who acquired unregistered shares, "the amount of potential recovery could far exceed the price at which the security was offered to the public." *Id.*

The SEC specifically considered what recourse might be available to persons who rely on misleading statements in a registration statement but who do not qualify for relief under Section 11. They would not be without remedy. "In appropriate circumstances a private right of action may be available under the antifraud provisions of the federal securities laws." *Id.* at 8 (citing Section 17(a) of the Securities Act, 15 U.S.C. 77q, and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5).

The SEC took the same position in another amicus brief in *McKowan Lowe & Co.* There the Commission weighed in on whether standing to sue under Section 11 was available to only those who purchase registered securities in the public offering or also to those who purchase registered securities in the secondary market. Br. for the SEC as Amicus Curiae Supporting Appellants, *McKowan Lowe & Co., v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002) (No. 00-3728). In arguing that the statute grants standing to all purchasers of registered securities, the SEC emphasized the importance of the statute's tracing requirement: "*[P]urchasers may not recover under Section 11 if they cannot trace their shares to a misleading registration statement*. . . . [I]f tracing is possible … liability extends to shares bought in the market as well as shares bought in the offering." *Id.* at 9 (emphasis added).

In the face of those judicial and administrative interpretations of Sections 11 and 12(a)(2), Congress's decision to leave the Security Act's pleading requirements untouched "enhances" the force of those precedents. *Faragher*, 524 U.S. at 792. Congress has thus ratified the well-established tracing requirement. *Id.*; *Lorillard*, 434 U.S. at 580.

II. The Ninth Circuit's Ruling Threatens To Harm Investors.

The majority's opinion, if left to stand, will have a chilling effect on companies going public in general. When a company goes public, it bestows benefits across the marketplace, including for retail investors. Public companies give investors important access to capital markets. They are subject to enhanced

reporting, auditing, corporate governance, and other requirements aimed at benefitting the investing public. Such enhanced requirements also promote an efficient market. As noted by former SEC Chairman Jay Clayton, fewer companies going public "results in fewer opportunities for Main Street Americans to share in our economy's growth." Remarks to the SEC investor Advisory Committee (June 22, 2017), http://bit.ly/40miTRe.

Going public via an Initial Public Offering ("IPO") has historically been a very expensive way for businesses to raise capital. The transaction costs of IPOs can prove too high for many companies seeking to access the public markets. Because direct listings do not utilize an underwriter, companies going public via a direct listing avoid the significant costs associated with the underwriting process. Direct listings have therefore reduced the costs of going public—a cost savings which benefits all market participants, including investors. The direct listing has proved instrumental in allowing more companies to go public by reducing transaction costs. Direct listings are therefore in the best interest of retail investors, who are served by the innovation and enhanced access.

Moreover, since direct listings do not raise additional capital, companies filing for a direct listing are likely to be more financially stable. The quality of companies filing for a direct listing is often higher than companies that need to raise capital via an IPO. Indeed, companies that have gone public through direct listings have, on average, outperformed the

S&P 500 and companies that went public using a traditional IPO. Maureen Farrell, Direct Listings Have Paid Off for Investors so Far, *The Wall Street Journal* (Aug. 30, 2021), http://bit.ly/3HO6EWf.

The uncertainty created by the Ninth Circuit's opinion is likely to dissuade companies from going public through a direct listing, given the potential for dramatically expanded liability. Faced with going public through an expensive IPO or through the uncertainty of a direct listing, companies may choose not to go public at all. Fewer companies going public will deprive the capital markets and its participants of the benefits of publicly trading those companies' shares.

Besides dampening capital markets in general, the decision below creates additional adverse consequences. First, the decision will increase the cost of direct listings. The Ninth Circuit's rule makes it nearly impossible for a prospective public company to predict the scope of liability—and related level of financial risk—that the direct listing method will entail. This increased risk in turn increases the cost of doing business, raising capital, and joining the capital markets. The practical impact of the decision below will price out many prospective public companies, as it also increases the risks and downsides of IPOs, further chilling capital formation.

The majority's decision also increases the already rising costs of Director & Officer ("D&O") insurance. Companies going public already must obtain expensive D&O insurance to mitigate the enormous—

and nearly unavoidable—costs associated with any securities litigation, including meritless suits filed to extract settlements. As the threat of securities litigation continues to rise, so too has the cost of D&O insurance. *See* John M. Orr, Insurance Marketplace Realities 2022 – Directors and Officers Liability (Nov. 15, 2021), https://bit.ly/3RmdlAd; D&O premiums grow 38.5% in 2021; loss ratio falls to multiyear low, S&P Global Market Intelligence (May 5, 2022), https://tinyurl.com/mrymcreh. As insurance rates increase inexorably, the Ninth Circuit's rule will only further encourage frivolous suits and exacerbate litigation costs.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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