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 FOR THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE CATO INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives to centralized, bureaucratic, and discretionary financial regulatory systems. Toward those ends, Cato publishes books

[1] Pursuant to Rule 37.6, Cato states that no counsel for a party authored this brief in whole or in part, and no entity or person, other than Cato and its counsel funded the preparation or submission of this brief.

and studies, conducts conferences, and files amicus briefs.

This case is important to Cato because the Ninth Circuit's departure from decades of securities-law precedents expands standing to sue under Section 11 of the Securities Act of 1933 (the "Securities Act") beyond its intended boundaries, in the process disincentivizing an alternative to traditional initial public offerings ("IPOs") that shows the potential for economic growth and wealth creation. Because of Cato's commitment to free and prosperous markets, Cato respectfully submits that the Court should reverse the judgment of the Ninth Circuit.

SUMMARY OF ARGUMENT

In *Barnes* v. *Osofsky*, 373 F.2d 269 (2d Cir. 1967), Judge Friendly wrote that Section 11 of the Securities Act, 15 U.S.C. § 77k—which imposes liability for material misstatements or omissions in connection with a registered offering on issuers, directors, officers, underwriters, and auditors—was limited to shares issued under the registration statement containing the alleged misstatement or omission. That is because "such securit[ies]" in Section 11 extends only to the "particular shares registered" under a given registration statement. *See id.* at 271-272. For over fifty years, courts have consistently applied that principle, supplying predictability to securities markets. But in a 2-1 decision, the Ninth Circuit upended this rule in favor of an expansive reading of Section 11 that usurps Congress's exclusive role in enacting securities laws and significantly alters the calculus companies face when deciding whether to go public, including by means of the direct listing method that Slack used to go public here.

In breaking with decades of precedent, the Ninth Circuit expanded the group of plaintiffs with Section 11 standing to include those who purchased *unregistered shares* (*i.e.*, shares not registered for sale under the registration statement but sold pursuant to exemptions from registration). Motivating the panel majority's decision was its concern that "interpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability." Pet. App. 17a. But, as Judge Miller explained in his forceful dissent, federal courts have repeatedly rejected the policy concerns driving the majority's decision, holding instead that it is up to lawmakers and regulators, weighing the political and economic costs and benefits, to expand Section 11 should they find that its balance of interests should be reconsidered.

The Ninth Circuit's policy-driven decision ignores the policy *benefits* of alternative public offering methods for entrepreneurs, startup companies, investors, and the economy as a whole. Direct listings, such as the one used by Slack here, offer unique benefits to companies and their shareholders by allowing existing shareholders to sell their shares on a public stock exchange without the delay and overhead associated with a traditional IPO, including by forgoing the use of underwriters. And by bringing more companies to the public markets, direct listings benefit companies by providing increased capital and benefit investors by providing increased transparency about the companies in which they invest.

But the Ninth Circuit's new rule has the potential to deter companies from ever going public by means of alternative offering methods in light of the costs associated with increased Section 11 litigation. Under the Ninth Circuit's approach, any costs saved from avoid-

ing underwriters and other IPO expenses could be replaced (or even overtaken) by the litigation costs of extending Section 11 standing to all post-offering purchasers.

Moreover, Congress crafted the Securities Act as a delicate balance between making issuers responsible for inaccurate disclosure and incentivizing companies to go public without excessive burdens from litigation. Section 11 of the Securities Act is an important aspect of this carefully balanced scheme. Because Section 11 provides for strict liability that penalizes even inadvertent mistakes in a registration statement, Congress limited the class of plaintiffs who can sue under Section 11 to shareholders who purchased shares that were issued under the registration statement containing the alleged misstatement or omission. This "tracing" requirement of Section 11 is "integral to Congress's decision to relax the liability requirements for a Section 11 claim." Cunningham et al., *Litigating Section 11's Tracing Requirement: A Practitioner's View of a Powerful Defense* 2, Bloomberg Law: Professional Perspective (2019), https://tinyurl.com/7b5tubkf.

But the Ninth Circuit's holding upsets Congress's balance of interests. Compared to Congress and the SEC, courts are ill-equipped to determine the proper interplay between regulations and economic incentives in the context of Section 11. If a change to the Securities Act's comprehensive liability scheme is warranted, Congress alone should make that determination. Accordingly, the Court should reverse the Ninth Circuit's error and ensure that Section 11 stays within the boundaries that Congress intended.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION THREATENS THE VIABILITY OF ALTERNATIVE OFFERING METHODS AND, IF UNCORRECTED, WILL HAVE BROAD ADVERSE CONSEQUENCES FOR THE U.S. ECONOMY

The Ninth Circuit's departure from decades of securities-law precedent expands Section 11 liability beyond its intended boundaries and threatens to hinder the economic potential of innovation in the public offering space, including the benefits of the direct listing method that Slack used to go public here.

Alternative offering methods benefit investors in the broader U.S. economy, particularly in an age when more and more private companies look at the regulatory landscape and high costs of traditional IPOs and choose to remain private for longer. *See The IPO Is Being Reinvented*, The Economist (Aug. 20, 2020), https://econ.st/3jzFmn7. By bringing more companies to the public markets, alternative offering methods such as direct listings give investors the opportunity to more easily own part of, and profit from the success of, a company and obtain enhanced access to information through mandatory disclosures. But the increased Section 11 liability and associated costs promised by the Ninth Circuit's holding will disincentivize private companies from pursuing innovative public offering methods that benefit entrepreneurs, startup companies, investors, and the economy as a whole.

Though an IPO is the traditional method used by private companies to go public, alternatives to the conventional IPO may better serve a range of companies, including niche issuers or so-called "unicorn" tech startups (*i.e.*, high valuation private startups like Spotify, Slack, Coinbase, and Warby Parker) whose capital

structure or objectives when going public may better align with a different offering type. Indeed, a variety of methods for public listing is consistent with the Securities Act, which was not designed to limit issuers to one offering type.

The direct listing is one alternative means of going public that has unique benefits for companies, their existing shareholders, and the economy at large. In direct listings, companies generally do not raise capital or issue any new shares. *See* Farrell, *Direct Listings Have Paid Off for Investors So Far*, Wall St. J. (Aug. 30, 2021) ("In general, companies that choose this route tend to be in solid financial shape because they don't need to raise capital through a traditional IPO."), https://tinyurl.com/muu4crjj. Instead, the issuer files a registration statement with the SEC, and shares registered for sale under the registration statement are immediately tradeable on a stock exchange, whereas shares not registered for sale under the registration statement become tradeable pursuant to exemptions from registration, such as SEC Rule 144. *See* 17 C.F.R. § 230.144. "In a direct listing, some shares are sold under the registration statement while others are not." Nickerson, *The Underlying Underwriter: An Analysis of the Spotify Direct Listing*, 86 U. Chi. L. Rev. 985, 1006-1007 (2019).

Direct listings offer out-of-the-garage-era employees and early investors in startup companies the liquidity of a public market and enable them to sell their shares at a market price, often with less red tape and overhead—and perhaps most importantly, delay—than a traditional IPO. While the traditional IPO usually imposes a 180-day lockup period for shares held by insiders and other pre-IPO shareholders, direct listings provide existing shareholders—including early em-

ployees and investors in startup companies—the opportunity to more easily sell their shares or convert their stock-option shares to cash. Indeed, direct listings "provide liquidity to existing stockholders without lockup agreements, and, as a result, the stockholders are free to sell their shares immediately." Rodgers et al., *Evolving Perspectives on Direct Listings After Spotify and Slack*, Harvard Law School Forum on Corporate Governance (Dec. 17, 2019), https://tinyurl.com/499fvrv2.

Existing shareholders also benefit in a direct listing by selling their shares at a market price, rather than at the initial price to the public set by underwriters in an IPO, which is often less than the market price after the stock begins public trading. *See* Ritter, *Initial Public Offerings: Underpricing*, tbl. 1 (Jan. 4, 2023), https://tinyurl.com/jxdy85f4 (finding that companies going public through traditional IPOs since 1980 have underpriced their stock by an average of 20%). Direct listings thus promote ingenuity and innovation by offering a company's early-stage employees and investors a more streamlined opportunity to reap a greater return on their investment than a traditional IPO.

Companies have likewise found direct listings to be a valuable means of going public. Direct listings eschew the traditional underwriting process, allowing companies to avoid the high transaction costs associated with engaging an underwriting syndicate to conduct an IPO. *See* Farrell, *Direct Listings Have Paid Off for Investors So Far*, *supra* ("In typical big IPOs, a dozen banks or more can share fees of $100 million. In direct listings, companies still pay fees—but slimmer ones, often in the tens of millions for similar size deals."); Busaba et al., The "7% solution" and IPO (under)pricing, 144 J. Fin. Econ. 953 (June 2022), https://

tinyurl.com/5375zxpr (94% of IPO issuers paid underwriters a 7% commission in sample of medium-sized IPOs from 1996 to 2018). Direct listings thus provide companies with a cost-effective avenue to go public when their objective is providing employees and early investors with access to the public markets as opposed to raising capital. Without the direct listing option, Slack, which did not need to raise capital, may have concluded that the transaction costs of a traditional IPO were too high to make going public worthwhile. *See* Pet. 30.

Moreover, direct listings avoid the underwriter's role in setting the price at which the securities will be traded. Instead, "the market sets the price at the very first instance"—avoiding the problem of issuers "leaving money on the table" for companies in a mispriced underwritten offering. Grundfest, *What Are Direct Listings, How Do They Work, and Why Do They Matter?*, Stanford Law School Blog (Jan. 10, 2020), https://tinyurl.com/2xezs9x7; *see also* Ritter, *Initial Public Offerings: Underpricing*, tbl. 1, *supra* (traditional IPOs suffer from roughly 20% underpricing). Notably, companies that have gone public through direct listings have "on average, outperformed the S&P 500 and a key broader index for initial public offerings during the same period." Farrell, *Direct Listings Have Paid Off for Investors So Far*, *supra*.

Attracted by these various attributes, it is no surprise that a number of companies—particularly in the technology sector—have taken the direct listing route since 2018. *See* Schulp, *IPOs, SPACs, and Direct Listings, Oh My!*, RealClearPolicy (May 21, 2021), https://bit.ly/2YuR9yC.

In addition to the benefits described above, the availability of direct listings has also begun to spur innovation in traditional IPOs, which have long been governed by custom and tradition that may not serve all companies well. *See, e.g.*, Zanki, *IPO Lockup Periods Begin to Loosen Amid Market Pressure*, Law360 (Sept. 17, 2021), https://bit.ly/30sLHx7; Brewer, *Analysis: Innovation May Make IPO 'Price Pops' Fizzle Out*, Bloomberg Law (Apr. 20, 2021), https://bit.ly/3omZxsU. But a halt in direct listings, which the Ninth Circuit's decision threatens, may slow or reverse changes to the traditional IPO process that are being brought about by this competition in listing alternatives.

Maintaining the existing regulatory scheme, including the liability limits built into Section 11, is crucial to supporting the direct listing as a viable alternative means of going public. But the Ninth Circuit's ruling that holders of shares not registered as part of a direct listing nonetheless can sue under Section 11 raises the costs of pursuing a direct listing, which may force some companies to remain private. Indeed, any costs saved from avoiding underwriters and other IPO expenses through a direct listing could be replaced (or even overtaken) by the litigation costs of extending Section 11 standing to all post-offering purchasers.[2] The Ninth Circuit's decision thus has the potential to cause companies to lose out on all the benefits of going public and cause public market investors to lose the opportunity to own part of, and profit from the success of, a company,

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[2] The potential costs of extending standing to all post-offering purchasers are even higher in the context of Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77*l*(a)(2), given that Section 12 includes full rescissory damages not limited to harm caused by the misrepresentation that the plaintiffs challenge in a prospectus. *See Pinter* v. *Dahl*, 486 U.S. 622, 641 n.18 (1988).

not to mention the benefits of increased transparency and access to financial information that come with a publicly traded company.

II. Courts Are Ill-Suited To Make Policy Decisions Concerning The Costs And Benefits Of Direct Listings

The Ninth Circuit may well disagree about the various economic benefits of companies going public through direct listings, but it is for Congress and the SEC—not the courts—to determine the proper interplay between regulations and economic incentive in the context of Section 11. In holding that unregistered shares also qualified as "such securit[ies]" under Section 11 because those shares "were sold to the public when 'the registration statement … became effective,'" the Ninth Circuit panel majority relied not on sound statutory construction but on a policy rationale—that "requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement" would "create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception." Pet. App. 16a, 18a; *see also* Pet. App. 28a (Miller, J., dissenting) ("What appears to be driving today's decision is not the text or history of section 11 but instead the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing.").

This policy-driven decision, however, ignores the fact that the difficulty in determining whether shares were issued under a particular registration statement is not a new question. Pet. App. 28a (Miller, J., dissenting) (explaining that "the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing …

is neither new nor particularly concerning"). Indeed, as Judge Miller noted, "[t]he plaintiffs in *Barnes* made precisely the same point about section 11 liability for secondary offerings, where, as they pointed out, it would be 'impossible to determine whether previously traded shares are old or new.'" *Id.* But the Second Circuit rejected the plaintiffs' request to "depart[] from the more natural meaning" of Section 11, explaining that any policy concerns were better directed to Congress than the courts. *Barnes* v. *Osofsky*, 373 F.2d 269, 273 (2d Cir. 1967). In following *Barnes*, other circuits have recognized that it is not the role of courts to rewrite the language of Section 11 simply because new developments in the marketplace, including new types of offerings, might make it harder to trace a security to a particular registration statement. As the Fifth Circuit put it:

> [When] Congress enacted the Securities Act of 1933 it was not confronted with the widespread practice of holding stock in street name that Appellants describe as an impediment … to invoking Section 11. That present market realities, given the fungibility of stock held in street name, may render Section 11 ineffective as a practical matter in some aftermarket scenarios is an issue properly addressed by Congress. It is not within our purview to rewrite the statute to take account of changed conditions.

Krim v. *pcOrder.com, Inc.*, 402 F.3d 489, 498 (5th Cir. 2005). In short, it is up to lawmakers and regulators, weighing the political and economic costs and benefits, to alter Section 11 should they find that its balance of interests is no longer desirable. Judges are not a part of the equation.

Moreover, even if the mechanics of a particular public offering type make it harder to sue under Section 11, both registered and unregistered shares are still within the scope of the federal securities laws. Where a purchased security cannot be traced to the relevant registration statement, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j—which is not tied to the registration statement—casts a catch-all net against intentional misstatements or omissions, and Section 11 can still maintain the disclosure-efficiency balance despite its general unavailability to claimants who cannot trace their shares to the registration statement. *See* Curnin & Ford, *The Critical Issue of Standing Under Section 11 of the Securities Act of 1933*, 6 Fordham J. Corp. & Fin. L. 155, 193 (2001) ("[T]here is no justification rooted in necessity, fairness or common sense to extend the protections of Section 11, which regulate disclosure in a registration statement, to purchasers in the secondary market who have a remedy under Section 10(b) and who never saw a registration statement."). If a change to this comprehensive liability scheme were warranted, Congress should be responsible for determining the parameters of Section 11 liability—a task Congress has not undertaken.

Further, the Ninth Circuit's stated policy concern that companies could be "incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements," Pet. App. 17a, is unfounded given the structure and purpose of direct listings. Because the issuer in the direct listing is a mere facilitator and not a first-order beneficiary of the transaction, the threat of Section 11 liability as a disincentive to misstatements

or omissions serves less need in a direct listing. *See* Pet. 8 ("[W]hereas IPOs are typically designed to raise capital for issuers, Slack sold no shares and made no money in its direct listing."). Moreover, in traditional IPOs, there are several organic "reputational incentives" for issuers to "be candid in their capital raising," with or without Section 11. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, 63 Law & Contemp. Probs. 45, 63 (2000). The same can be said for direct listings. *See* Grabar et al., *A Look Under the Hood of Spotify's Direct Listing*, Harvard Law School Forum on Corporate Governance (Apr. 26, 2018) ("So while participants in a direct listing have plenty of reasons to exercise care in respect of disclosure, it is hard to see a strong argument that additional liability risk from Securities Act registration adds to those reasons."), https://bit.ly/3khAjZI.[3]

Finally, the Ninth Circuit's focus on policy concerns overlooks the fact that it is not a foregone conclusion that tracing is impossible in a direct listing. New technologies (and novel application of existing technologies) might well make it easier for claimants to determine whether the shares they purchased were registered for sale in direct listings or were sold pursuant to exemptions from registration. Blockchain, for example, may provide such a means, allowing ownership of a particular share to be traced from its issuance to its current holder. *See generally* Belcher, *Tracing the Invisible: Section 11's Tracing Requirement and Blockchain*, 16

[3] Moreover, companies are incentivized to comply with the requirements of the Securities Act regardless of Section 11 liability, namely in order to avoid SEC enforcement actions, including enforcement actions under Section 17 of the Securities Act, 15 U.S.C. § 77q.

Colo. Tech. L.J. 145 (2017); *see also* Vanyo & Rotenberg, *Blockchain Technology May Enable Tracing in Securities Act Litigation*, Litigation Advisory, Katten Muchin Rosenman LLP (Mar. 22, 2018) ("Tracing, now virtually impossible, might be accomplished by the click of a button or the scan of a bar code on a stock certificate."), https://bit.ly/35GrMcM. But these innovations are for Congress and regulators to evaluate. It is not for the courts to intervene and make a policy-based adjustment to settled law when an offering's design happens to make tracing difficult or infeasible.

In this light, expanding the definition of "such security" to cover shares not registered for sale as part of the direct listing, as the Ninth Circuit did, undermines the Securities Act's balance of transparency through disclosure and imposes burdens that risk inhibiting economic growth.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted.

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