No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC, ET AL.,

Petitioners,

v.

FIYYAZ PIRANI,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF INSTITUTIONAL INVESTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici consist of thirteen (13) pension funds and institutional investors, which collectively manage over $68 billion dollars, much of it in public equity markets. *Amici* steward these investments on behalf of over 594,000 of American workers, including firefighters, police officers, teachers, and healthcare workers.

Signatories to this brief include the:

- Indiana Public Retirement System
- Public School Teachers' Pension and Retirement Fund of Chicago
- Fire and Police Pension Association of Colorado
- Louisiana Sheriffs' Pension & Relief Fund
- Allegheny County Employees' Retirement System
- Southeastern Pennsylvania Transportation Authority
- City of Cambridge Retirement System
- City of Miami Fire Fighters' and Police Officers' Retirement Trust
- City of Miami General Employees' & Sanitation Employees' Retirement Trust
- Lehigh County Employees' Retirement System
- Hollywood Firefighters' Pension Fund

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a contribution.

- West Palm Beach Firefighters' Pension Fund
- West Palm Beach Police Pension Fund

The Appendix details *amici*'s respective assets and beneficiaries.

Pension funds like *amici* are the primary vehicle through which millions of American workers invest their savings in the public markets, and thus have a strong interest in effective enforcement of the securities laws to deter fraud and to pursue appropriate compensation for those injured by fraud. Undersigned *amici* rely on the investor protections provided by the Securities Act of 1933 to protect their beneficiaries and pensioners and safeguard their best interests. For almost ninety years, the Securities Act has been a critical safeguard for investors to deter companies from making material misstatements in public offering materials.

Amici offer their perspective as large investors in U.S. public equities who care deeply about healthy markets and investor protection. We urge the Court to consider the economic context of the question presented and the complex ways in which registered and unregistered shares are sold and commingled.

SUMMARY OF ARGUMENT

Pension funds and institutions like *amici* make long-term investments on behalf of hundreds of thousands of beneficiaries. That long view on the markets reveals three core points relevant to this case.

First, in recent years, an important change has occurred in the U.S. equities: The classical initial public offering ("IPO") (whereby a private company issues new shares pursuant to a registration statement with the Securities and Exchange

Commission ("SEC")), which was once the principal method of "going public," is no longer the only way of going public. There has been a rapid growth in alternative methods, including direct listings and special purpose acquisition companies. This has led to an increase of the commingling of shares that are sold pursuant to a registration statement (known as registered shares) and shares that are exempt (known as unregistered shares). There is no way of readily determining the provenance of shares upon purchase. Behind the scenes, the clearance and settlement process is thoroughly commingled and complex.

Second, market participants continue to rely on a steady flow of truthful information provided in robust registration statements and subsequent public filings. Investors like *amici* employ scores of analysts who scour registration statements as a critical source of accurate data about a given company, its performance, and its stock price. When such statements contain material misrepresentations, investors need to understand their possible recourse—including through pleading Section 11 claims—to fulfill their fiduciary duties or obtain recompense. This is entirely reasonable and serves an important function in a market economy.

Third, while times may have changed since 1933, the core structure of the Securities Act has not. Petitioners' cramped view of the statute would create a *de facto* opt-out regime, whereby companies could evade Section 11 and Section 12 coverage by employing new strategies to commingle unregistered and registered shares. This would undermine the Securities Act, harm long-term investors, and reward obfuscation and gamesmanship in significant new stock listings. Petitioners' proposed interpretation also soft-pedals the fact that the text of Section 11 contains general language and broad mandates that duly support the construction of "such security" by the Ninth Circuit.

This Court should affirm the decision below. Under all circumstances, it should be especially careful in how it formulates any decision that might impact the ability to plead and prove a Section 11 or Section 12(a) claim based on the traceability of securities to a registration statement, which is already technically difficult and legally labyrinthine (even for the nation's largest institutional investors). Moreover, *amici* respectfully ask the Court refrain from issuing a decision that could preclude investors from showing that federal law requires registration of all shares in a direct listing—or treating all the shares as registered under the integrated offering doctrine.

ARGUMENT

I. THE COMMINGLING OF REGISTERED AND UNREGISTERED SHARES IS COMPLEX AND CONSEQUENTIAL.

In U.S. public equity markets, there are different methods by which a company can legally sell shares to the general public under the Securities Act.

The traditional method of going public is an IPO, in which a company sells new securities to the public in order to raise capital. In any IPO listing, a company must issue these new shares pursuant to an SEC-approved registration statement that registers the new shares with the SEC.[2] Investment banks help the company manage the IPO process and help to establish a trading market for the new securities.

[2] 15 U.S.C. § 77e(c).

Investment banks also underwrite the offering, usually by buying the new registered shares at a negotiated price (in a traditional "firm commitment underwriting"),[3] and reselling those shares at the offering price in an "initial distribution,"[4] once the shares become listed for trading on an established stock exchange such as the New York Stock Exchange ("NYSE").[5] Because underwriters want to ensure the stability of the price of the registered securities, underwriters typically insist that a company enter into a "lockup agreement," which prohibits company insiders—including the issuer's directors, officers, and employees, their friends and family, and venture capitalists and other pre-IPO private investors—from selling their shares in the public market for a set period of time.[6] The terms of lockup agreements may vary and many prevent insiders from selling their shares for 180 days,[7] but they are not required by law.

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[3] *See generally* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* 32 (4th ed., 2022).

[4] *See* Joseph A. Grundfest, Morrison, *The Restricted Scope Of Securities Act Section 11 Liability, And Prospects For Regulatory Reform*, 41 J. Corp. L. 1, 10 (Fall 2015); SEC Investor Bulletin, "Investing in an IPO," SEC Pub. No. 133 (2/13), at 2, https://www.sec.gov/files/ipo-investorbulletin.pdf (noting that there are two ways the general public can invest in a new public company—directly participating in the IPO (usually institutional investors such as pension funds, hedge funds, etc.) or purchasing shares when they are resold in the public market in the days following the IPO (which is more common)).

[5] SEC Investor Bulletin, "Investing in an IPO," *supra* at 2.

[6] SEC, "Initial Public Offerings: Lockup Agreements," https://www.sec.gov/answers/lockup.htm.

[7] "Lockups also may limit the number of shares that can be sold over a designated period of time." SEC, "Initial Public Offerings: Lockup Agreements," https://www.sec.gov/answers/lockup.htm.

The SEC has noted that "[w]hile lockup agreements are customary in firm commitment initial public offerings, in the Commission's experience they often do not cover all of the outstanding shares."[8]

A. There are now several ways to go public other than a traditional IPO.

Traditional IPOs are no longer the only way to sell shares to the general public. In the case at bar, Slack Technologies, LLC ("Slack"), opted to allow its pre-existing shareholders who had acquired their shares privately to sell those shares publicly through a "direct listing" on the NYSE called a "Selling Shareholder Direct Floor Listing." Unlike in an IPO, in a Selling Shareholder Direct Floor Listing, the company does not issue any new shares. For instance, here Slack opened up 283 million shares for trading, 118 million of which were registered, JA 4, all of which were held by insiders or early investors. While the company must still file a registration statement with the SEC, the public offering is "solely for the purpose of allowing existing shareholders to sell their shares" on the

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"Some states require lockup agreements under their 'blue-sky' laws." *Id.* Notably, some attorneys suggest shortening the lockup periods on traditional IPOs for the very purpose of making it more difficult to plead a claim under Sections 11 and 12(a) of the Securities Act. *See* Boris Feldman, *A Modest Strategy for Combatting Frivolous IPO Lawsuits*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Mar. 13, 2015).

[8] *See* Self-Regulatory Organizations; New York Stock Exchange LLC; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Chapter One of the Listed Company Manual To Modify the Provisions Relating to Direct Listings, Release No. 34–90768, 85 Fed Reg. 85807, 85816 n.110 (Dec. 29, 2020).

exchange.[9] This creates what are known as "traceability" problems because the company ostensibly only registers those of its shares that are not exempt under SEC Rule 144, but both those shares and shares exempt under Rule 144 enter the market simultaneously. Here, Slack registered only those shares that fell outside the exemptions. *See* Br. 9. Moreover, because a direct listing allows a company to list "without a related underwritten offering" from a bank,[10] there is no lockup period preventing any qualified shareholders, whether listed in the accompanying registration statement or not, from selling their shares at the time of the direct listing. For various reasons, "[i]n recent years, direct listings have become more popular." *See* Federal Judicial Center, *Federal Securities Law* at 32 (4th ed. 2022).

Additionally, "[o]ver the past decade there has been a dramatic increase in public offerings for blank check companies known as SPACs (special purpose acquisition companies)," which "allows a privately held company to go public with much less advance disclosure than would exist in a traditional initial public offering." *Id.* at 33.[11] Other post-IPO methods of offering and sale exist as well. *See generally* Priya Huskins, *Is it Really that Bad? Follow-On Offerings and Section 11 Suits in State Court*, D&O Diary (June

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[9] SEC Approval 2018, 83 Fed. Reg. at 5651. *See also* NYSE, Section 102.01B, Footnote E.

[10] NYSE, Section 102.01B, Footnote E.

[11] With SPACs, "investors commit their funds to a [shell] company and give the managers a blank check to decide how to invest those funds . . . to acquire a yet-to-be-determined privately held company in order to make the privately held company publicly held." Federal Judicial Center, *supra* at 33. When a SPAC identifies a target company and consummates a combination, it is called a "de-SPAC" transaction.

19, 2019), https://www.dandodiary.com/2019/06/articles/securities-litigation/guest-post-is-it-really-that-bad-follow-on-offerings-and-section-11-suits-in-state-court/ (discussing follow-on, secondary, and M&A offerings).

B. The system for delivering, clearing, and settling stock is thoroughly commingled.

Any public sale of securities in the United States, including in a traditional IPO or a direct listing, operates through a complex system that commingles registered and unregistered stocks. If the Court adopts Petitioners' argument, it would result in investors having to undertake an onerous task of tracing any security to a specific registration statement under the Securities Act.

"The vast majority of securities transactions in the United States occur in certificateless, electronic book-entry form," and are "represented exclusively through entries on electronic ledgers."[12] This includes "shares sold in the initial distribution" (that is, in an IPO, where registered shares are sold by the underwriter in a prearranged sale), shares that are sold in subsequent on-exchange aftermarket trading,[13] and, analogously, all shares sold on an exchange in a direct listing and

[12] Grundfest, *supra* at 13. While Grundfest's scholarship describing the mechanics of securities transactions is generally illuminating, he is mistaken to conclude that tracing or distinguishes shares is "impossible." *Amici* also disagree with Grundfest's stance in this specific case, *see generally* Br. for *Amici Curiae* Jay Clayton and Joseph A. Grundfest, and note that other scholars have taken a contrary position about the feasibility of tracing, *see, e.g.*, Br. for *Amici Curiae* John C. Coffee, Jr. and Joshua Mitts.

[13] *Id.* at 13-14.

then sold in aftermarket trading, as well as trading in the secondary market. These securities transactions are, at least without enormous effort, indistinguishable from each other, for four key reasons.

1. <u>All shares of the same class are identified by a common number</u>. Dating well before the enactment of the Securities Act of 1933, securities were issued in the form of numbered paper certificates, and the settlement of securities transactions required the actual delivery of the physical certificates.[14] By the 1960s, the increasing volume of securities and securities trading made this system untenable, and eventually Congress delegated to the SEC the responsibility of addressing the problem.[15] A central clearing entity, the Depository Trust and Clearing Corporation ("DTCC"), was established, and it became the permanent record holder for the vast majority of securities in the United States.[16] Presently almost all U.S. securities are electronically held through DTCC:

> The clearance, custody, and settlement process for securities traded in the United States now operates largely through two subsidiaries of the DTTC—the DTC [(the "Depository Trust Company")], which is the largest securities depository in the world, and the National Securities Clearing Corporation ("NSCC"), which provides clearing and settlement services to broker-dealers and other participants.[17]

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[14] George S. Geis, *Traceable Shares and Corporate Law*, 113 Nw. U. L. Rev. 227, 232 (2018).

[15] *Id.*

[16] *Id*. at 232-33. *See generally* https://www.dtcc.com/.

[17] Grundfest, *supra* at 16.

Each issue of securities held by DTTC and its subsidiaries is given a CUSIP, which is an alphanumeric code used to identify the security. However, all shares of the same company that are of the same class (e.g., common stock), regardless of when and how they were offered, are identified by the same CUSIP. In this way, DTTC records them as a fungible, electronic book-entry aggregate bulk.[18]

2. <u>The vast majority of public equities are held in street name</u>. Seventy to eighty percent of all U.S. public-company stock is held in "street name," i.e., in the name of the custodian bank, broker-dealer, or other Wall Street entity at which the beneficial owner's account is held.[19] Thus, neither the issuing company nor DTTC or its subsidiaries ever know the names of the institutional or individual investors who are the beneficial owners of the shares being held or transacted.[20] Only the banks, broker-dealers, and other "street entities" know the names of the beneficial owners who actually own the shares represented by the street-name account at DTTC or its subsidiaries, which is another challenge to tracing a security to any registration statement.[21]

When smaller banks are involved, the tracing challenge is compounded:

> Because custodial services is [sic] a specialized and highly competitive function, many small banks that take custody of assets will deposit

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[18] *Id.* at 14.

[19] Grundfest, *supra* at 14-15; Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 Geo. L.J. 1227, 1237 (2008).

[20] Grundfest, *supra* at 14-15. *See also* Geis, *supra* at 233-34.

[21] Grundfest, *supra* at 15. *See also* Geis, *supra* at 233-34.

> those assets with another, larger, specialized bank custodian. This "piggybacking" can involve three or four tiers. These "respondent" banks keep track of their own customer accounts, with the larger bank simply recording on its records how many shares it is holding for the respondent bank.[22]

Thus, banks often do not even know the names of the beneficial holders of the shares being held or transacted.

3. A centralized entity holds securities in a fungible block. For securities traded in the United States, the clearance, custody, and settlement process operates through a centralized entity, DTC, which holds all securities of a particular class in a fungible bulk. When participating banks and broker-dealers deposit securities into their DTC accounts, DTC "holds the securities in 'fungible bulk,' meaning that there are no specifically identifiable shares directly owned by DTC participants" or their investor customers:

> [E]ach participant owns a pro rata interest in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant, such as an individual investor, owns a pro rata interest in the shares in which the DTC participant has an interest.[23]

Thus, a particular investor whose securities are held in a depository like DTC "does not own any actual physical securities, even if such physical securities

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[22] Kahan & Rock, *supra* at 1239.

[23] Grundfest, *supra* at 17 (internal quotation marks and citations omitted).

existed, which is typically not the case."[24] Rather, an investor "holds a 'securities entitlement' in the aggregate number of shares of a particular stock, or fungible bulk, controlled by [their] broker-dealer and held in the depository," DTC.[25]

4. <u>The electronic book-entry format makes it difficult to identify the transfer of a particular share</u>. The process for settling and transferring securities—known as electronic book-entry form—makes it even harder to trace a particular share once it enters the marketplace. "The book-entry system accounts for share transfers by electronically debiting the selling broker's account and simultaneously crediting the purchasing broker's account in the same amount," but "[b]ecause there is no paper trail to follow, securities within the book-entry system are no longer linked to the individual investors who actually purchased or sold the shares."[26]

This system is aimed at increasing "processing efficiency" by "netting all of the transactions among the participants that occur each day, so that entries need be made on the depository's books only for the net changes in the position of each participant . . . at the end of each day."[27] In practice, this means, for example, that if one customer of a broker-dealer buys the same amount of the same kind of shares of a particular company as another customer of the same broker-dealer sells on the same day, the broker-dealer does not report a change to DTC, and DTC does not record any transfers on its books for that broker for

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[24] *Id.*

[25] *Id.*

[26] *Id.* at 18-19.

[27] U.C.C. Article 8, Prefatory Note 1.C (1994).

that particular day.[28] The only record of the customers' transactions is the broker-dealer's internal record of their accounts.

Yet other complexities can arise.[29] The bottom line is that because of both the advent of new offering types and the elaborate pre-existing systems for trading and storing securities, registered and unregistered securities are commingled.

C. The commingling of registered and unregistered shares has important implications for institutional investors.

Institutional investors like *amici* are concerned about what Petitioners' tracing requirements would mean for investors in light of the complexity and consequences of commingled stock. This is an oft opaque and technically intricate phenomenon. It can make all the difference between whether institutional investors like *amici* are able to protect, grow, and (in cases of fraud) recover value for their pensioners, or whether they are mired in extensive tracing and litigation over the ability to trace even when the harm suffered—and the misrepresentations that caused that harm—are not in dispute.

The Council of Institutional Investors, a nonprofit, nonpartisan association whose members collectively manage $4 trillion in assets, has also highlighted the issue of commingling and the problem of tracing unregistered and registered shares. They stressed that

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[28] Grundfest, *supra* at 18-19.

[29] Huskins, *supra* (analyzing scenarios where commingling and tracing can be further complicated depending on the specific "way in which [a post-IPO] offering is handled," e.g., when an investment bank has shares of the same class in its house accounts).

the "situation becomes murkier . . . after the end of an IPO lockup period, when insiders are free to sell their shares in the company . . . [and there are] successive offerings—the first according to a registration statement and then offerings by company insiders after the lockup period is over." *In the Matter of the Petition of: Council of Institutional Investors*, Release No. 34-898, at 8-9 (Sept. 8, 2020).[30] "The [SEC's] 2018 rule change that authorized secondary direct listings of insider shares blurred this distinction because the registration of employee shares permitted not only the sale of shares covered by the registration statement, but also the simultaneous sale of unregistered shares held by insiders." *Id.*

The issue of commingling and tracing has been recognized by the SEC too:

> Shares may have . . . entered the market prior to a potential claimant's purchase other than through the registered offering, such as through sales pursuant to Rule 144. For example, the shares might have been sold by insiders . . . following the expiration of lockup agreements or applicable restricted periods, or . . . by other shareholders who were never subject to any such agreement. Furthermore, traceability concerns can arise when shares *are held in fungible bulk—as they usually are*—such that an investor is not able to establish that the particular shares purchased were acquired pursuant to, or are traceable to, a particular misleading registration statement.

[30] *Available at* https://www.sec.gov/rules/sro/nyse/2020/34-89684-petition.pdf.

SEC Release No. 34-90768, 2020 WL 7681889, at 36-37 (Dec. 22, 2020) (emphasis added).[31]

All told, the commingling of registered and unregistered shares makes it more difficult for institutional investors to tell what type of asset they are actually buying, and to protect their rights when they invest in a company that makes a material misstatement resulting in losses to investors. Numerically, this means the difference between whether billions of dollars in losses for *amici*'s beneficiaries caused by an issuer's misstatements are recoverable, or instead whether these losses will diminish pension-fund returns over time.

II. PETITIONERS' CRAMPED CONSTRUCTION OF SECTION 11 WOULD HARM INSTITUTIONAL INVESTORS.

Petitioners' proposed interpretation of Section 11, Br. 20-28, suffers from several serious problems that stem from the issue of commingling.

First, Petitioners' interpretation envisions an arbitrary separation of claims for registered shares and unregistered shares. As laid out above, that is simply not the economic reality of public equities in the United States—nor does it reflect the current ways in which securities cases are litigated. Both Petitioners and their *amici* state that companies choose a *single* "method of going public to fit their business needs," Br. for the Chamber of Commerce et al., as *Amici*, p. 3. *See also* Pet. Br. 8. But in truth, companies can and do choose *multiple* offering methods in the same period.

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[31] *See also* SEC Release No. 34-90768 at 36-37 ("These situations [of commingling shares] arise where shares may have been issued pursuant to more than one registration statement, not all of which include material misstatements or omissions.").

In Slack's direct offering, the nature of the transaction and the needs of investors did not vary based on the type of share or the identity of the seller. Rather, all the shares were sold simultaneously and in the same manner, so the transaction constitutes an integrated offering. *See generally* 17 C.F.R. § 230.520(a).

Second, Petitioners' rigid regime would create a recipe for evasion by certain companies.[32] Under Petitioners' view, a company could elect to sidestep Section 11 by finding a way to sell—and hence commingle—registered and unregistered shares at the same time. Noticeably, leading defense counsel (who co-authored the U.S. Chamber of Commerce's *amicus* brief here) even admit to this as a benefit of conducting a direct listing that commingles unregistered and registered shares. *See* Andrew Clubok, *et al.*, *Complex and Novel Section 11 Liability Issues*, Corp. Counsel (Dec. 20, 2019) (stating that an "important advantage of the direct listing [was] the potential to deter private plaintiffs from bringing claims under Section 11"). Although much has changed since the Securities Act was enacted in 1933, its basic structure has not. Petitioners might wish otherwise, but the Act is not an opt-out regime.

For example, Petitioners' position would enable issuers to combine de-SPAC transactions with unregistered direct listings, imperiling plaintiffs' ability to hold issuers accountable when they promulgate material falsehoods. This harm is hardly theoretical: SPACs present increased risks to investors, as demonstrated by high-profile examples of companies merging with SPACs and subsequently

[32] Likewise, the Ninth Circuit recognized the risk of a "large" "loophole." Pet. App. 17a-18a.

collapsing and causing massive investor losses (while providing a financial windfall to some on Wall Street).[33]

Adopting Petitioners' interpretation of Section 11 would reward companies for obfuscation of ownership or regulatory gamesmanship, with no appreciable statutory or public benefit. Petitioners' interpretation also flies in the face of several SEC statements suggesting that Section 11 protections should apply to direct listings[34] and de-SPAC transactions,[35] which

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[33] *See, e.g.*, Eliot Brown, *SPAC Sponsors Were Winners Even on Losers*, Wall St. J. (Oct. 15, 2022) ("Share prices of more than one-third of the 339 SPACs that have merged with private companies since 2020 are down more than 80%"), https://www.wsj.com/articles/spac-sponsors-were-winners-even-on-losers-11665794518); Jessica DiNapoli, *Special Report: How Wall Street banks made a killing on SPAC craze*, Reuters (May 11, 2022) ("retail investors lost $4.8 billion, or 23%, of the aggregate $21.3 billion they plowed into SPACs from the beginning of 2020 to the first week of April 2022"), https://www.reuters.com/business/finance/how-wall-streetbanks-made-killing-spac-craze-2022-05-11/.

[34] In 2021, when the SEC expanded the use of direct listings to allow issuers (as opposed to only insiders) to raise capital through new direct listings, the SEC specifically pointed to the district court opinion in this case assuring § 11 liability in these offerings. *See* SEC Release No. 34-91947, at 30 (May 19, 2021). In 2020, it provided similar assurances when it approved new rules for direct listings on the New York Stock Exchange. *See* SEC Release No. 90768, at 37 (Dec. 22, 2020) ("[w]e expect judicial precedent on traceability in the direct listing context to continue to evolve, but the Commission is not aware of, nor have commenters pointed to, any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims.").

[35] *See* John Coates, Acting Director, SEC Division of Corporate Finance, *Public Statement: SPACs, IPOs and Liability Risk Under the Securities Laws*, at 2 (Apr. 8, 2021) ("any material misstatement in or omission from an effective Securities Act

amici and others had relied upon for some measure of assurance.

Third, Petitioners' position would injure institutional investors like *amici*. Investors—big and small alike—reasonably rely on a company's registration statements, regardless of the traceability of the particular shares they are buying. Indeed, there is a legal presumption that public markets promptly digest information contained in these critical registration statements and that this information shapes stock prices generally. *See Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1957 (2021) (discussing the "*Basic* presumption . . . premised on the theory that investors rely on the market price of a company's security, which in an efficient market incorporates all of the company's public misrepresentations."). Yet under Petitioners' theory, exempt, unregistered shares may not be subject to a registration statement. And SPAC offerings involve registration statements for the blank check company, but they do not provide the kind of robust information about its backers or about the risks or performance of future acquisition targets.

Relatedly, since 1933, shareholders have relied upon Section 11 to recoup losses when registration

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registration statement as part of a de-SPAC business combination is subject to Securities Act Section 11"; "a de-SPAC transaction gives no one a free pass for material misstatements or omissions"); *see also* SEC Release Nos. 33-11048; 34-94546 "Special Purpose Acquisition Companies, Shell Companies, and Projections" (Mar. 30, 2022); Gary Gensler, SEC Chair, *Statement on Proposal on Special Purpose Acquisition Companies (SPACs), Shell Companies, and Projections* (Mar. 30, 2022) (proposed rules governing SPACs "would strengthen disclosure . . . and gatekeeper and issuer obligations by market participants in SPACs, helping ensure that investors in these vehicles get protections similar to those when investing in traditional IPOs.").

statements for offerings are misleading. Petitioners' arguments would upend much of that longstanding reliance and certainty. Moreover, by foreclosing Section 11 claims in a significant swathe of new stock offerings, it would result in increased losses for *amici* when misleading statements do occur. As a statutory matter, Petitioners' position would deny investors material information (about whether they are purchasing registered or unregistered shares) and effectively impose an improper condition upon investors (that they waive their Section 11 rights). *Cf.* 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.").

Over time, narrowing Section 11 coverage might also make institutional investors shy away from stocks that are riskier because the company's information cannot be relied upon, and recompense for losses caused by issuers' misstatements is unavailable. That could chill early-stage investments in innovative startups, since seed-stage investors would foresee fewer protections and diminished market demand if and when the startups eventually go public.

Contrary to Petitioners' protestations, allowing plaintiffs to broadly plead Section 11 claims is entirely sensible in markets where commingling of registered and unregistered shares is common and effectively unobservable. *Amici*'s position is that there is no need under the Securities Act to trace a particular share in the case of a direct listing. Even if there were to be such a tracing requirement, in light of the considerable complexity and commingling described above, it should be implemented in the context of full discovery and expert testimony about how the plaintiff (or a class of plaintiffs, at large) could trace the shares. It would be inappropriate to implement any tracing requirements at the pleading stage. Under all circumstances, this Court should be especially careful in how it formulates any decision that might impact the practice of tracing, which is already difficult and labyrinthine—even for the nation's largest pension funds, like *amici*.

Furthermore, *amici* respectfully urge the Court refrain from issuing any decision that could prevent investors (in this case or others) from arguing that federal law requires registration of all shares in a direct listing—or from treating all the shares as registered under the integrated offering doctrine.

III. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 11 WAS RIGOROUS AND CORRECT.

In contrast with Petitioners' stance, the Ninth Circuit adopted a reasonable and correct interpretation of Section 11, consistent with the statute's general language, broad preamble, and stated purpose. Section 11's text supports a broad reading:

> 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* (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue . . . .

15 U.S.C. § 77k(a) (emphasis added). Section 12(a)(2) contains a similar prohibition for false or misleading

statements in prospectuses. *Id.* § 77*l*(a) ("such security").

Section 11 is ambiguous with respect to the meaning of "such security," as recognized by the district court's decision, *see* 445 F. Supp. 3d at 379, Judge Miller's dissent from the Ninth Circuit decision, *see* Pet. App. 24a, and the seminal opinion in *Barnes v. Osofsky*, 373 F.2d 269, 271 (2d Cir. 1967). Unlike every other occurrence of this phrase in the Securities Act, Section 11's "such security" has no antecedent, and so it can mean *either* (A) only securities registered under a registration statement, or (B) also securities whose public offering is made possible by the registration statement, as held by the Ninth Circuit.

It is well established that "[a] word or phrase is ambiguous when the question is which of two or more meanings applies . . . ." Antonin Scalia & Bryan A. Garner, *Scalia and Garner's Reading Law: The Interpretation of Legal Texts* 46 (2012). Given this ambiguity, the Court should construe Section 11 in light of its broad language and sweeping purpose.

The broad language Congress used—"such security"—should be given its full scope, which encompasses new types of public offering. "General terms are to be given their general meaning," and "the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." Scalia & Garner, at 92.

Section 11 also contains a broad preamble that properly informs the statute's meaning. "A preamble, purpose clause, or recital is a permissible indicator of meaning," so that the preamble can "be considered in determining which of various permissible meanings the dispositive text bears." Scalia & Garner, at 177-78. Thus, the Act's preamble favors applying Section 11 to direct listings to promote "full and fair disclosure" and "prevent fraud" in securities offerings. 48 Stat. 74.

Moreover, the ambiguous portions of Section 11 should be read in light of Congress's principal purpose in enacting the Securities Act. *See also* 48 Stat. 74; 15 U.S.C. § 77b(b). Indeed, this Court has long affirmed that a "fundamental purpose" of the Securities Act is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). Through its liability provisions, Section 11 effectuates Congress' determination that those who publicly offer securities bear a "moral responsibility to the public [that] is particularly heavy." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 581 (1995) (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess., at 5 (1933)).

At bottom, *amici* endorse the convincing interpretation of Section 11 made by the Ninth Circuit, and advanced by Respondent before this Court, particularly in light of the economic realities of U.S. public equity markets.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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March 6, 2023

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LIST OF *AMICI*

The signatories to this brief are as follows.

Indiana Public Retirement System

Indiana Public Retirement System ("INPRS") is a $36.9 billion pension fund operated for the benefit of public employees in the State of Indiana. INPRS serves the needs of approximately 467,332 members and retirees representing more than 1,200 employers, including public universities, schools, municipalities, and state agencies.

Public School Teachers' Pension and Retirement Fund of Chicago

The Public School Teachers' Pension and Retirement Fund of Chicago ("Chicago Teachers") is a pension fund established for the benefit of the current and retired public school teachers of the city of Chicago, Illinois. Chicago Teachers provides benefits for over 27,000 retirees and beneficiaries, manages over $11.8 billion in assets for its beneficiaries, and is responsible for providing retirement benefits to more than 31,000 current public employees and 6,861 vested inactive employees.

Fire and Police Pension Association of Colorado

Fire and Police Pension Association of Colorado ("Colorado FPPA") is a defined benefit pension plan that provides services and benefits to Colorado firefighters and police officers and their beneficiaries upon retirement, disability, or death. Colorado FPPA manages approximately $8 billion in assets for the benefit of its approximately 30,000 active and retired participants.

Louisiana Sheriffs' Pension & Relief Fund

Louisiana Sheriffs' Pension & Relief Fund ("Louisiana Sheriffs") is a public pension fund that provides pension and other benefits for sheriffs, deputy sheriffs, and tax collectors in the State of Louisiana. Louisiana Sheriffs manages approximately $4 billion in assets for the benefit of its approximately 20,000 active and retired participants.

Allegheny County Employees' Retirement System

The Allegheny County Employees' Retirement System ("Allegheny County") is a single-employer defined benefit, contributory retirement benefit plan established in 1915 and headquartered in Pittsburgh, Pennsylvania. As of December 31, 2020, Allegheny County managed approximately $1 billion in assets on behalf of nearly 12,600 participants.

Southeastern Pennsylvania Transportation Authority

Southeastern Pennsylvania Transportation Authority ("SEPTA) is an institutional investor based in Philadelphia, Pennsylvania that manages more than $1.4 billion in assets on behalf of approximately 14,000 participants in SEPTA's five single-employer, defined benefit pension plans for all non-regional-rail-union employees in Southeastern Pennsylvania.

City of Cambridge Retirement System

City of Cambridge Retirement System ("Cambridge") is a contributory retirement system for active and retired employees of the City of Cambridge, Massachusetts, the Cambridge Housing Authority, the Cambridge Public Health Commission, and the Cambridge Redevelopment Authority. As of September 1, 2021, Cambridge manages approximately $1.7 billion in assets on behalf of approximately six thousand participants.

City of Miami Fire Fighters' and Police Officers' Retirement Trust

City of Miami Fire Fighters' and Police Officers' Retirement Trust ("Miami Fire Fighters") was founded in 1939 and provides retirement and disability benefits to over 2,000 Miami-based firefighters and police officers. As of September 30, 2018, Miami Fire Fighters manages more than $1.7 billion in assets.

City of Miami General Employees' & Sanitation Employees' Retirement Trust

The City of Miami General Employees' & Sanitation Employees' Retirement Trust ("Miami") is a government entity that was founded in 1985 to provide benefits—including retirement, death, and disability benefits—to eligible employees of the government of the City of Miami, Florida. Miami manages more than $704 million in assets for the benefit of active and retired members.

Lehigh County Employees' Retirement System

Lehigh County Employees' Retirement System ("Lehigh"), based in Pennsylvania, is a defined benefit plan governed under the Taft-Harley Act. Lehigh provides retirement, disability, and death benefits to workers within the County of Lehigh, Pennsylvania. Currently, Lehigh manages approximately $544 million in assets on behalf of approximately 3,600 participants.

Hollywood Firefighters' Pension Fund

Hollywood Firefighters' Pension Fund ("Hollywood Firefighters") is a pension fund established for the benefit of the current and retired firefighters of the city of Hollywood, Florida. Hollywood Firefighters manages over $248 million in assets for its beneficiaries.

West Palm Beach Firefighters' Pension Fund

West Palm Beach Firefighters Pension Fund ("WPBFPF") is a pension fund based in West Palm Beach, Florida that provides retirement benefits for firefighters. As of September 30, 2019, WPBFPF managed total assets in excess of $233 million on behalf of over 364 current employees, retirees, and beneficiaries.

West Palm Beach Police Pension Fund

West Palm Beach Police Pension Fund ("West Palm Beach Police") is a public pension fund that provides retirement benefits to over 500 police officers and their families. As of June 30, 2021, West Palm Beach Police manages approximately $450 million in pension assets.