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IN THE SUPREME COURT OF THE UNITED STATES

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SLACK TECHNOLOGIES, LLC, FKA SLACK)

TECHNOLOGIES, INC., ET AL.,)

Petitioners,)

v.) No. 22-200

FIYYAZ PIRANI,)

Respondent.)

- - - - -

Washington, D.C.

Monday, April 17, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:44 a.m.

APPEARANCES:

THOMAS G. HUNGAR, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

KEVIN K. RUSSELL, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:44 a.m.)

CHIEF JUSTICE ROBERTS: Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE PETITIONERS

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

Sections 11 and 12 of the '33 Act expressly reference and enforce the registration statement and prospectus requirements imposed by Section 5 of the Act, 15 U.S.C. 77e. In construing the term "such security," therefore, it's appropriate to look to the meaning of that same term as used in Section 5, the source of the prohibitions enforced by Sections 11 and 12. And it's undisputed that "such security" in Section 5 consistently refers only to shares that are subject to registration, never to exempt shares. "Such security" in Sections 11 and 12 should be given the same meaning.

That reading is confirmed by this Court's decision in Gustafson, which held that it's more reasonable to interpret the liability provisions of the '33 Act as providing remedies for violations of the obligations it had

1 created, not as imposing liabilities independent
2 of the substantive obligations of the Act.

3 Respondent's contrary interpretation
4 would run roughshod over the core statutory
5 distinction between registered and exempt
6 shares, which is fundamental to the structure
7 and operation of the '33 Act, and it would
8 dramatically expand the scope of liability,
9 disrupt the capital formation process, and upset
10 settled expectations by overturning decades of
11 case law and SEC interpretation consistently
12 holding that plaintiffs must prove they
13 purchased registered shares.

14 Respondent can't identify a single
15 case in the 90-year history of the Securities
16 Act imposing Section 11 liability on exempt
17 shares. Congress, despite revisiting the Act
18 numerous times over the years, has been content
19 to leave the law that way.

20 This Court should reject Respondent's
21 attempt to overturn that long-settled
22 understanding.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: You mentioned 90-year
25 history, but have we had direct listing before?

1 I mean, that seems to be what's causing the
2 problem.

3 MR. HUNGAR: We haven't had direct
4 listing before, Your Honor, but, certainly,
5 there are other circumstances, and it's
6 undisputed that there are many other
7 circumstances, in which the tracing requirement,
8 given the modern operation of the securities
9 markets, is difficult or sometimes impossible
10 for plaintiffs to -- to satisfy, but that has
11 not led Congress to change the law, and it has
12 not led the SEC to adopt any of the possible
13 mechanisms it could adopt to address that
14 concern if it felt it should do so.

15 JUSTICE THOMAS: You mentioned the
16 tracing requirement. The -- could you speak a
17 little bit about where that comes from and why
18 there's a tracing requirement?

19 MR. HUNGAR: Well, so, fundamentally,
20 it's -- there's no doubt that Congress intended
21 and required there to be tracing and expected
22 tracing would be required.

23 JUSTICE THOMAS: For each share, as
24 opposed to simply saying there's registration,
25 and as a result of that, the stocks are being

1 sold?

2 MR. HUNGAR: Because -- because the --
3 the -- again, the core distinction in the Act is
4 between shares that are registered and shares
5 that aren't. So, for instance, putting aside
6 the issues in this case, Section 12(a)(1), which
7 creates a cause of action for unregistered
8 shares, in order to prevail on that cause of
9 action, a plaintiff obviously has to prove that
10 they purchased unregistered shares, not
11 registered shares. That's been in the Act from
12 the beginning.

13 So there's no doubt that Congress knew
14 that plaintiffs would be required to trace. The
15 same is true under Sections 11 and 12(a)(2) for
16 all the reasons that we've articulated.

17 JUSTICE THOMAS: Finally, on the --
18 why -- do you think that 11 and 12 rise and fall
19 together?

20 MR. HUNGAR: We do, and -- and this
21 Court's decision in Gustafson, I think, makes
22 that same point, that a core rationale of the
23 Court's decision in Gustafson, as I said, is
24 that the -- the liability provisions imposed by
25 Sections 11 and 12 should be construed

1 co-extensively with the obligations they
2 enforce. The obligations they enforce arise
3 under Section 5, which imposes an obligation to
4 register particular securities, the shares that
5 -- that have to be registered, and requires a
6 prospectus to be delivered only in connection
7 with particular securities, namely, registered
8 securities.

9 JUSTICE JACKSON: But isn't -- isn't
10 12(a)(2) broader? I understood 12(a)(2) to also
11 include at least some exempt shares. So I -- I
12 go back to what Justice Thomas was just saying
13 about them rising and falling together. It
14 seems as though 12(a)(2) at least, that
15 liability provision is broader.

16 MR. HUNGAR: You're -- you're correct,
17 Your Honor, in that Section 12(a)(2) expressly
18 brings back into the scope of liability certain
19 categories of exempt shares, namely, those
20 exempted by Section 3, which exempts particular
21 classes of securities from other obligations of
22 the Act. So, under Section 12(a)(2), Congress
23 specifically spoke to the question of which
24 exempt shares should be subjected to liability.

25 JUSTICE JACKSON: Right. But doesn't

1 that undermine your sort of broader point that
2 all of the liability that Congress was thinking
3 about with respect to Sections 11 and 12 run to
4 registered shares? I mean, we have a discussion
5 in 12 that, as you say, points to certain exempt
6 shares and, I think, preserves liability with
7 respect to those. So --

8 MR. HUNGAR: Well, it does, again,
9 because Congress explicitly said so, but it --
10 but, importantly, the parenthetical that -- that
11 brings Section 3 exempt shares back into the
12 scope of liability under Section 12(a)(2) refers
13 only to Section 3, not to Section 4.

14 And this Court in Gustafson relied on
15 that distinction and said that that silence,
16 that congressional silence with respect to
17 Section 4, as opposed to the congressional
18 reference to Section 3, must be given effect.

19 JUSTICE SOTOMAYOR: But why would it
20 needed to have mentioned Section 4? On Section
21 3, it needed to do that because Section 12
22 itself states that it applies to most securities
23 exempt under Section 3. But Section 4 really
24 exempts only certain transactions.

25 MR. HUNGAR: Correct.

1 JUSTICE SOTOMAYOR: Not all
2 unregistered, only certain transactions that are
3 unregistered.

4 MR. HUNGAR: Correct.

5 JUSTICE SOTOMAYOR: So it seems to me
6 that the negative of Section 4 is, if it's not
7 mentioned, it's covered by 12.

8 MR. HUNGAR: Well, this Court in
9 Gustafson expressly addressed that question and
10 said exactly the opposite, that the -- the --
11 the important distinction is that what the Court
12 was saying in Gustafson --

13 JUSTICE SOTOMAYOR: No, no, but
14 Gustafson was dealing with whether -- what the
15 prospectus had to contain. It wasn't dealing
16 with this question of what the meaning of "by
17 means of a prospectus" has to -- has to say.

18 MR. HUNGAR: Well, with respect,
19 Your Honor, it was. The Court in Gustafson said
20 that "by means of a prospectus" limits Section
21 12(2) to public offerings. That's at page 577.
22 And it said at page 571 liability under Section
23 12(2) cannot attach unless there is an
24 obligation to distribute the prospectus. The
25 obligation to distribute the prospectus is

1 limited to registered shares.

2 JUSTICE GORSUCH: Mr. Hungar, I
3 thought, though, that direct -- direct share
4 sales required -- could only happen under at
5 least the SEC rules with the registration
6 statement.

7 MR. HUNGAR: No, Your Honor. The --
8 I'm not sure I understand your --

9 JUSTICE GORSUCH: There are no
10 registration statements required to do direct
11 sales at all?

12 MR. HUNGAR: Well, I guess I'm not
13 sure what you mean by "direct sales." So a
14 public offering, which -- which, by definition,
15 is an offering that's not exempt under Section
16 4, requires a registration.

17 JUSTICE GORSUCH: I'm sorry, direct --
18 I'm talking about direct listings, okay, rather
19 than sales.

20 MR. HUNGAR: Oh, I'm sorry.

21 JUSTICE GORSUCH: I'm sorry, but I
22 thought the SEC required, before you had a
23 direct listing, you had to file a registration
24 statement.

25 MR. HUNGAR: Well, the NYSE rule

1 requires a registration statement for a direct
2 listing but only with respect to registered
3 shares. It doesn't apply by definition to --

4 JUSTICE GORSUCH: But there is still a
5 requirement that you have a registration
6 statement before you do a direct listing?

7 MR. HUNGAR: Sure. Just like there's
8 a requirement that you --

9 JUSTICE GORSUCH: So there is an
10 internal referent in Section 12 the way there
11 isn't in Section 11. Judge Friendly in Barnes
12 thought that was significant, and -- and, you
13 know, you rely heavily on Judge Friendly, and
14 it's a good source to rely on in Section 11.
15 But, you know, what helps you with 11 hurts you
16 on 12 at least in Judge Friendly's mind. And
17 why -- why was the great old man wrong?

18 MR. HUNGAR: Well, he was wrong
19 because he -- he -- he -- he didn't anticipate
20 the decision in Gustafson, which clarified the
21 scope of Section 12(a)(2) liability. And
22 Gustafson holds that -- as I said, that the --
23 that the scope of liability under Section 12(2)
24 is limited to the obligation to distribute a
25 prospectus. There is no obligation to

1 distribute a prospectus with respect to Section
2 4 exempt transactions --

3 JUSTICE KAVANAUGH: Can I --

4 MR. HUNGAR: -- which is what we're
5 talking about here.

6 JUSTICE ALITO: Were you required to
7 issue a prospectus in order to do the direct
8 listing?

9 MR. HUNGAR: Yes, because the
10 prospectus and registration requirement are --
11 are co-extensive.

12 JUSTICE ALITO: Right.

13 JUSTICE KAVANAUGH: The questions that
14 Justice Gorsuch is asking and Justice Sotomayor
15 about 12(2) raised for me a question, which is
16 there's a lot of law out there about Section 11
17 and starting with Judge Friendly's opinion
18 and -- and going all the way down.

19 There's not a lot of law out there on
20 the Section 12 issue, and I'm a bit concerned
21 about deciding that issue without the SEC here,
22 without more law out there, without knowing more
23 about the Section 12 issue. So I'll just --
24 that's what I'm thinking.

25 MR. HUNGAR: Your Honor, the Section

1 12 issue has not come up very much because of
2 limitations on Section 12 in other respects, I
3 think, but this Court's decision in Gustafson --

4 JUSTICE KAGAN: Could you explain that
5 when you have a moment? I don't want to take
6 you away from -- why hasn't the Section 12 issue
7 come up?

8 MR. HUNGAR: Okay.

9 JUSTICE KAVANAUGH: So take it now.
10 (Laughter.)

11 MR. HUNGAR: Okay. Yeah. I think --
12 so there have been some cases, and the -- and
13 the cases since Gustafson --

14 JUSTICE KAVANAUGH: Don't forget mine.

15 MR. HUNGAR: There have been some
16 cases, and the cases since Gustafson have agreed
17 with our position as I understand it, but it's
18 not a lot of cases, and -- and previous to
19 Gustafson, I mean, Section 12 has the privity
20 requirement, which in many jurisdictions imposes
21 a substantial limitation. The district court in
22 this case took a different approach. So that
23 constrains the number of cases that can be
24 brought.

25 In the old days before this Court made

1 clear that Section 10(b) has a scienter
2 requirement and -- and made clear that there's
3 a -- a comparable statute of limitations, 10(b)
4 was a much more popular route than Sections 11
5 or 12. They just -- they just don't come up
6 nearly as much as Section 10(b).

7 10(b) is the primary securities law
8 civil cause of action, and that's -- the vast
9 majority of the cases arise under that, which is
10 another reason why the sky is not going to fall
11 if this Court adheres to the course of the last
12 90 years in this case.

13 JUSTICE KAVANAUGH: Would a -- can you
14 go back to mine then?

15 MR. HUNGAR: I'm sorry, Your Honor,
16 could you remind me of the question?

17 JUSTICE KAVANAUGH: I figured that was
18 going to happen.

19 JUSTICE KAGAN: Sorry.

20 JUSTICE KAVANAUGH: That's what
21 happens.

22 Why not allow the lower courts to sort
23 out the Section 12 issue before we give a
24 definitive ruling on that?

25 Because I feel, in looking at this, on

1 Section 11, there's a lot of law. The SEC's
2 position's been out there for a long time. A
3 lot of cases. We don't really have that on --
4 on Section 12. And I guess I'm just worried
5 about making a mistake on Section 12 one way or
6 another because we don't have the kind of
7 thorough consideration we usually have before we
8 give a definitive opinion on something.

9 MR. HUNGAR: Well, the one thing that
10 the district court and the court of appeals got
11 right in our view is -- is the fact that "such
12 security" should be construed the same in both
13 provisions.

14 JUSTICE KAVANAUGH: So that's a great
15 point for you, but as Justice Gorsuch points
16 out, I think the reference is not -- there are
17 differences between 11 and 12 over the exact
18 same language, and maybe you ultimately win on
19 that or maybe you don't, but that strikes me as
20 a big issue for these direct listings and
21 something that I'm not sure we're fully equipped
22 at this moment to chime in on.

23 MR. HUNGAR: I think the Court's
24 decision in Gustafson answers these questions.
25 The -- the -- the -- the fundamental logic --

1 JUSTICE KAVANAUGH: I read it a lot,
2 and I didn't come away with, like, this is the
3 clear answer to the Section 12 issue.

4 MR. HUNGAR: But, Your Honor, the --
5 the --

6 JUSTICE KAVANAUGH: Maybe I -- maybe I
7 should have.

8 MR. HUNGAR: -- the fundamental logic
9 of the Gustafson decision is that Section 12(2)
10 is -- 12(a)(2) is limited to public offerings,
11 that is, sales, public sales by the issuer, the
12 controlling shareholders, underwriters, that --
13 that category. It doesn't extend to the other
14 kinds of sales of securities which the Act
15 describes --

16 JUSTICE KAGAN: If we put --

17 MR. HUNGAR: -- which are exempt
18 transactions.

19 JUSTICE KAGAN: -- if we put Gustafson
20 aside for just a second, I mean, everything
21 about Section 12 reads differently from Section
22 1. There's absolutely no reference to
23 registration. The "such security" language does
24 not refer back to -- to registration in any way.

25 It talks about prospectuses, but it

1 also talks about or -- oral communications,
2 which suggests that it's broader than the
3 registration context. And, you know, it has the
4 specific exemption. So there's really nothing
5 in Section 12 that makes it like Section 11.

6 MR. HUNGAR: Well, I mean, putting
7 aside Gustafson kind of ties one arm behind my
8 back.

9 JUSTICE KAGAN: No, I mean, you know,
10 because there's a -- there's a -- there's
11 different views of exactly how far Gustafson
12 went in what it says. And one view is Gustafson
13 is just talking about what a prospective means,
14 and it's not talking about this question of what
15 it means to, you know, by means of a prospectus.

16 So, anyway, you know -- and there are
17 contested views of what Gustafson means. We
18 always look at the language of a statute. You
19 know, it's just one of the things that we do.
20 And the language of Section 12 is not the same
21 in every relevant way.

22 MR. HUNGAR: Well, that's certainly
23 true, but there are multiple clues as to why
24 Section 12 should be interpreted the way we
25 suggest.

1 Number one, Congress said "such
2 security," not "any security," which is
3 obviously broader language like -- and it used
4 that same language in Section 17, which everyone
5 acknowledges does apply to exempt transactions,
6 as well as registered -- registered shares.

7 The -- the -- the -- the logic of --
8 of Gustafson can't be reconciled with the
9 position you're suggesting because Gustafson
10 says that the -- that the liability imposed by
11 Section 12 is co-extensive with the obligation
12 to distribute a prospectus, which, by -- by
13 virtue of Section (5)(b)(2), is coextensive with
14 registered shares.

15 Section (5)(b)(2) says that it's
16 unlawful to disseminate shares in interstate
17 commerce unless such security is accompanied by
18 a prospectus, and "such security" there
19 necessarily refers only to registered shares.
20 My friends on the other side agree with that.

21 "Such security" in Section 12 should
22 be given the same meaning as a matter of -- of
23 normal statutory construction as the same term
24 used in -- in the provision that it's enforcing.

25 And, again --

1 JUSTICE KAVANAUGH: Do we know what
2 the SEC thinks about your Section 12 argument?
3 Not that we would necessarily defer to it, but
4 it's usually informative.

5 MR. HUNGAR: I don't know that they
6 have specifically taken a position on that
7 question. Obviously, they have taken quite
8 affirmatively and repeatedly a position on the
9 Section 11 question, including in this Court in
10 the Herman & MacLean case, where they told this
11 Court explicitly that Section 11 provides a
12 cause of action only for purchasers of
13 registered shares. We cited that brief in our
14 -- in our opening brief.

15 JUSTICE GORSUCH: Mr. Hungar --

16 MR. HUNGAR: And they -- they chose
17 not to participate in this case, obviously
18 concluding that the prior position they had
19 taken before this Court was -- was sufficient.

20 JUSTICE GORSUCH: Mr. Hungar, would --
21 I guess another way of asking the question my
22 colleagues are getting at is, would the sky fall
23 should we answer the Section 11 question in your
24 client's favor, vacate and remand, without
25 addressing the Section 12 question?

1 MR. HUNGAR: Well, certainly, it would
2 fall in this case because the court of appeals
3 answered that question and it answered it
4 wrongly, and --

5 JUSTICE GORSUCH: And we're going to
6 vacate its judgment in light of your
7 arguments -- supposing we were, in light of your
8 arguments on Section 11, and maybe it should
9 reconsider its Section 12 ruling in light of
10 that.

11 JUSTICE KAVANAUGH: And just to add to
12 that, the reason they did reach the conclusion
13 on 12, I believe, is because they thought 11 and
14 12 should be read together, which all three --

15 MR. HUNGAR: Yes.

16 JUSTICE KAVANAUGH: -- judges did, two
17 against you and one in your favor, but if they
18 know -- the Ninth Circuit knows that you're
19 actually prevailing on Section 11, who knows
20 what they'd do on Section 12.

21 MR. HUNGAR: Yes, certainly, that
22 would be better than where we stand right now.
23 Obviously, we think --

24 JUSTICE GORSUCH: I would have
25 thought.

1 (Laughter.)

2 MR. HUNGAR: We -- we obviously think
3 that in light of the Court's decision in
4 Gustafson, it -- it necessarily follows. I
5 mean, again --

6 JUSTICE GORSUCH: I know we've got
7 the -- I've got --

8 MR. HUNGAR: Yeah.

9 JUSTICE GORSUCH: -- Gustafson, even
10 if I can't pronounce it correctly.

11 (Laughter.)

12 JUSTICE GORSUCH: But -- but that
13 would be an available course to the Court in
14 your mind?

15 MR. HUNGAR: Yes. I mean, there
16 are -- there are further textual reasons, even
17 putting Gustafson aside, why our interpretation
18 of Section 12 is correct. I mentioned the "any"
19 versus "such," which, you know, a textual
20 distinction. This Court normally gives meaning
21 to those distinctions.

22 It's also true in Section 3 of the Act
23 Congress referred to classes of securities.
24 Respondent's interpretation of "such security"
25 would essentially rewrite it to mean the whole

1 class, and yet Section 3 of the Act makes clear
2 that when Congress intended to refer to classes
3 of securities, it said so. And it didn't say so
4 in Section 12. It said "such security," which,
5 again, refers -- is -- should be given a
6 parallel construction to Section 5.

7 JUSTICE JACKSON: But can you help me
8 to understand, though, going back to Justice
9 Kagan's point, all of the differences that we
10 see between 12 and 11?

11 I mean, you're pointing to two areas
12 that you think are similar, but it seems as
13 though liability arises from the offering or
14 selling of a security by means of oral
15 communication, which doesn't have anything to
16 do, I guess, at least on its face, with a
17 prospectus. And so why would you have to have a
18 registered share in order to give rise to that
19 kind of liability?

20 MR. HUNGAR: Well, this Court said in
21 Gustafson that -- that oral communication has
22 been construed to be -- given its -- that it
23 appears together with the prospectus and in a --
24 in a statute where the -- the structure makes
25 clear that -- that, you know, what a prospectus

1 is and when it's obligated to be distributed,
2 that oral statement has to be understood as a
3 reference to the prospectus, that something
4 along the lines of the prospectus, referring to
5 the contents of the prospectus, at the same time
6 --

7 JUSTICE JACKSON: All right. So even
8 in a situation where you have a prospectus, my
9 understanding was that a prospectus is a part of
10 a registration statement, but I suppose it could
11 also be separate. Am I right about that? Like,
12 it's a separate document.

13 MR. HUNGAR: It's a separate document
14 that is -- that is physically part of -- so the
15 registration statement contains a prospectus
16 that doesn't have all the final information.
17 The final prospectus is filed separately, but
18 it's incorporated as part of the registration
19 statement. So, yes, it's part of the
20 registration statement, but you could hand
21 someone a prospectus that doesn't have the full
22 registration statement.

23 JUSTICE JACKSON: And in that
24 situation where you hand someone a prospectus
25 and the prospectus has misleading or at least

1 arguably misleading information, your view is
2 that unless they did so in connection with a
3 registered share, there's no liability?

4 MR. HUNGAR: Yes, because that's what
5 Gustafson holds. Gustafson says "by means of"
6 means --

7 JUSTICE JACKSON: No, I understand.

8 MR. HUNGAR: Okay.

9 JUSTICE JACKSON: But what do we do
10 with the language in the statute, Section 12,
11 that suggests that there is liability with
12 respect to at least some exempt shares? I guess
13 I can't -- if you were right that registration
14 was sort of the core requirement of liability
15 under 12(a), how do we have a 12(a) that applies
16 on its face to some exemptions?

17 MR. HUNGAR: Well, because -- because
18 that's what Congress said. Congress specified
19 the exempt shares to which Section 12 would
20 apply. The reason it did that is because,
21 otherwise, exempt shares or exempt transactions
22 --

23 JUSTICE JACKSON: But, if you were
24 right -- if you were right about your thesis, if
25 you were right that 12(a) really is all about

1 registered shares, then we wouldn't see an
2 exemption. I appreciate that Congress put it in
3 here, but I think that undermines your argument
4 about what 12(a) is actually doing.

5 MR. HUNGAR: No, Your Honor, because,
6 without that parenthetical that brings Section 3
7 exemptions back into the scope of liability, all
8 the Section 3 classes of shares would be exempt
9 from Section 12 liability. But Congress wanted
10 Section 3 classes -- because, you understand,
11 Section 3 exempts an entire class like bank
12 securities or savings-and-loan securities. They
13 are not subject to the registration requirement,
14 to the Section 11 liability requirements. But
15 Congress -- because those are often issued in
16 public offerings, just like nonexempt shares,
17 Congress wanted those public offerings of
18 otherwise exempt shares to be covered by --

19 JUSTICE JACKSON: Is it direct lists
20 --

21 JUSTICE BARRETT: But is it like --

22 JUSTICE JACKSON: Go ahead.

23 JUSTICE BARRETT: I was just going to
24 ask you, I mean, the QP said whether plaintiffs
25 must plead and prove that they bought registered

1 shares -- sorry -- we're -- we're asking whether
2 12(a)(2) can only apply when there are
3 registered shares. You're taking the position
4 yes. But, by the same token, as this
5 interchange with Justice Jackson is showing,
6 12(a)(2) can apply sometimes to shares that are
7 exempt from registration, right?

8 MR. HUNGAR: Yes, actually, three
9 classes.

10 JUSTICE BARRETT: So why isn't that --
11 if we decided it very narrowly to avoid some of
12 the problems Justice Kavanaugh is flagging,
13 couldn't we just say no, the answer to that is
14 no because it applies, as Justice Jackson was
15 saying, on its face to some shares that are
16 exempt from registration? So, no, we don't have
17 to decide the limits?

18 MR. HUNGAR: But this isn't a Section
19 3 case. This is not a case involving a Section
20 3 exempt class.

21 JUSTICE BARRETT: So you would just
22 read that exemption very narrowly, is kind of
23 your answer to Justice Jackson? I'm sorry.
24 Read that language about Section 3 in saying
25 which nonexempt shares are out of 12 -- you just

1 read it very narrowly?

2 MR. HUNGAR: I would read it according
3 to the text. Congress said Section 12 imposes
4 liability, which this Court said is -- is,
5 generally speaking, contemporaneous with the
6 prospectus requirement, except there's an
7 exception. Congress made an exception to that
8 limited scope. The exception is, oh, but we're
9 bringing back into this the classes that are
10 exempted by Section 3.

11 So, in addition to most securities
12 where the rule is only -- only if there's a
13 prospectus obligation and, therefore, only if
14 there's a registered share can you have Section
15 12 liability, in this limited category of cases,
16 namely, Section 3 exempt classes, you can also
17 have Section 12 liability even though there's no
18 prospectus obligation.

19 But that has nothing to do with this
20 case because this case is not a Section 3 exempt
21 class; it's a Section 4 exempt transactions
22 case. And -- and Congress did not say, oh, and
23 we also want Section 4 exempt transactions to be
24 covered by Section 12. And that makes perfect
25 sense because Section 4 exempt transactions, by

1 definition, are not public offerings. That's
2 why they're exempt under Section 4. That's what
3 the Gustafson Court said in explaining why
4 Section 12 -- putting aside the Section 3
5 exception, Section 12 is limited to -- to public
6 offerings, that is, non- -- non- -- offerings
7 that are not exempted by Section 4.

8 JUSTICE KAVANAUGH: Can I ask you a
9 question about Section 11? The former SEC
10 officials' amicus brief suggests that they
11 expected that in a direct listing, the
12 registration statement would cover all the
13 securities, all the shares, and they say that
14 your position would essentially transform the
15 '33 Act into an opt-out regime for direct
16 listings and that we shouldn't do that, and that
17 was contrary to the SEC's expectation when they
18 tackled this issue.

19 Do you just want to respond to that?

20 MR. HUNGAR: Yes, Your Honor. That's
21 clearly wrong for multiple reasons. In the
22 first place, the SEC approved the registration
23 in this state -- in this case and, indeed,
24 allowed it to take effect -- effect in advance
25 of the normal time frame after reviewing it.

1 The registration makes very clear at page 235 of
2 the Ninth Circuit excerpted record that in
3 addition to the 118 million registered shares
4 being made available, there are already 165
5 million exempt shares free to trade under the
6 SEC's own rule that -- that -- that addresses
7 the Section 4 exemption.

8 So it's perfectly clear the SEC knew
9 there would be additional exempt shares that
10 weren't being registered that could -- could --
11 that would trade and already were free to trade
12 even before the direct listing.

13 Beyond that, the SEC in 2020, in the
14 -- in the order that's discussed in the briefs,
15 where it approved the most recent version of the
16 NYSE direct listing rule, a commentator raised
17 concerns about Section 11 liability in the
18 direct listing context. They said, gee, it's
19 really hard to prove Section 11 liability in the
20 direct listing context because it's hard to
21 trace.

22 And the SEC acknowledged that, said,
23 well, yes, that's true, but there are lots of
24 circumstances in which tracing is different in
25 the modern securities market, and that's not a

1 reason not to approve the rule change.

2 JUSTICE KAVANAUGH: Could the SEC fix
3 this, or could only Congress fix this? So I
4 know the word "fix" is loaded, but you know what
5 I mean, change this.

6 MR. HUNGAR: Yes, the SEC could fix
7 this, and if I may, I'd like to finish my answer
8 to the previous question --

9 JUSTICE KAVANAUGH: Sure.

10 MR. HUNGAR: -- because this is --
11 this is important. This conclusively
12 demonstrates that the -- that the argument on
13 the other side that direct listings were
14 supposed to require exempt shares to be
15 registered is just wrong. It would have made no
16 sense for the SEC to be talking about the
17 difficulty of tracing in the direct listing
18 context if the SEC thought that exempt shares
19 had to be registered in a direct listing. There
20 would be no tracing problem if direct shares had
21 to be registered in a direct listing. So,
22 obviously, the SEC knew and understood and
23 expected that exempt shares would not be
24 registered in a direct listing.

25 The SEC and the -- and the amicus

1 brief by Chairman Clayton of the SEC, who was
2 the chairman at the time that that rule -- that
3 that order was issued, and Professor Grundfest
4 identifies a number of things the SEC could do
5 to address this if they thought it was a
6 problem. They have chosen not to do any of
7 those things to date. They have the power to do
8 it.

9 And the law and business professors'
10 brief also suggests that a recent regulatory
11 change after this case, the creation of the
12 consolidated audit trail, may facilitate tracing
13 in the future. That remains to be litigated.
14 But, again, the SEC has ample authority to
15 address this if they think it's a problem.

16 CHIEF JUSTICE ROBERTS: Thank -- thank
17 you, Mr. Hungar. You indicated that the reason
18 the SEC wasn't here, because they obviously
19 adhered to the prior position that they had
20 expressed. Do you have any evidence for that?

21 MR. HUNGAR: No, Your Honor, but I --
22 we think that's a reasonable inference since, if
23 they -- if they had wanted this Court to be
24 aware that they had a different position, I
25 would think they would have told the Court.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas?

3 JUSTICE THOMAS: One small question.
4 How would you go about proving which shares are
5 registered in a trade like this?

6 MR. HUNGAR: Well, in a -- in a case
7 like this, you would need --

8 JUSTICE THOMAS: Or a listing. I'm
9 sorry.

10 MR. HUNGAR: -- you would need to be
11 able to trace the shares to the seller because
12 the identity of the seller and the -- and the
13 basis for their sale determines whether they
14 were registered or exempt. That is, if -- if
15 the -- if a seller was a controlling shareholder
16 who could only sell registered shares and --
17 and, therefore, they were -- they were selling
18 the shares that were registered under the
19 registration statement, that would satisfy.

20 Now, again, it's very difficult. We
21 don't think that it can be done in this case.
22 There's another pending state case where
23 plaintiffs claim they can prove it, and that's
24 being litigated. But the fact that it's
25 difficult doesn't justify reinterpreting the

1 statute, particularly since the difficulties
2 arose decades after the statute was enacted in
3 the 1960s.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: You're asking us
8 on Section 11 to reverse the judgment below.
9 But Respondent is asking us to vacate and remand
10 so that they can have an opportunity to prove
11 tracing.

12 You're basically arguing, I think,
13 that they waived that. Isn't waiver always an
14 issue that we let the court below decide?

15 MR. HUNGAR: I don't know that you
16 always let -- I mean, it's a question of
17 forfeiture here not only in the courts below but
18 also in this Court. They didn't raise in their
19 brief in opposition any claim that, oh, by the
20 way --

21 JUSTICE SOTOMAYOR: Well, I think they
22 do when they say vacate and remand and let us do
23 it.

24 MR. HUNGAR: But -- but, Your Honor,
25 normally, this Court doesn't reach issues or

1 take account of issues that were forfeited even
2 in this Court. Again, we said in our
3 petition --

4 JUSTICE SOTOMAYOR: But it wasn't
5 forfeited --

6 MR. HUNGAR: They're --

7 JUSTICE SOTOMAYOR: -- in this Court.
8 They said give us a chance to prove we can.

9 MR. HUNGAR: Under Rule 15, Your
10 Honor, they forfeited it by not saying in their
11 brief in opposition.

12 JUSTICE SOTOMAYOR: Okay. I'm not
13 going to fight any longer with you on that.

14 I was intrigued by some amici
15 suggesting that we adopt a burden-shifting
16 framework. As I understand that -- what's
17 happening here is that these direct listing
18 mechanisms are being -- are being touted and
19 advanced in order to avoid having any tracing of
20 direct listings of -- of public offerings.

21 And so, if we were concerned about
22 that, it did seem to me that the burden-shifting
23 idea made some sense. You are purposely
24 avoiding a public offering to avoid having to
25 sell only registered stock during a locked-up

1 period, and so you're evading all Section 11
2 liability, even though you are registering, as
3 the SEC requires, you're -- you're issuing a
4 registration statement before you can issue any
5 stock whatsoever.

6 So I guess my question to you is,
7 shouldn't we be leaving open that question on
8 the burden shifting, and why shouldn't we?

9 MR. HUNGAR: So several responses.
10 The burden-shifting argument is one of many
11 issues that wasn't raised in the brief in
12 opposition or below and shouldn't be addressed
13 by the Court.

14 Number two, burden-shifting --

15 JUSTICE SOTOMAYOR: I'll accept that,
16 but should we leave it open?

17 MR. HUNGAR: Well, I mean, I don't
18 think the Court should address it at all because
19 it's not presented in the case, but -- but, if
20 the Court were to say something about it,
21 there's no basis at all for burden-shifting in
22 this statute.

23 JUSTICE SOTOMAYOR: Well, there's no
24 basis in the statute for tracing either --

25 MR. HUNGAR: But the statute --

1 JUSTICE SOTOMAYOR: -- which hews
2 judicially -- from --

3 MR. HUNGAR: Well, again, as I said,
4 Section 12(a)(1) shows that Congress necessarily
5 mandated tracing, but, beyond that, the statute
6 in Sections 11 and 12, Congress very carefully
7 addressed the question of burdens.

8 It specifically assigned certain
9 burdens that would normally have been on the
10 plaintiff to the defendant in both of those
11 provisions, such as the burden of proving a lack
12 of negligence or due diligence.

13 And so Congress has spoken very
14 specifically to the question of burden
15 allocations. And this Court should not
16 essentially redo Congress's work for it and
17 decide that additional burdens should be placed
18 on the plaintiffs.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Mr. Hungar, I just
21 wanted to go back to the Section 11, Section 12
22 distinction and give you a chance again to tell
23 me why I might be wrong about the textual
24 differences between the two sections.

25 And, again, I want to just put

1 Gustafson off the stage because I think we might
2 just have a difference as to how far it went and
3 what it said.

4 So I count four key differences
5 between the two sections. First, there's no
6 reference in Section 12 to registration; second,
7 Section 12 clearly covers some unregistered
8 shares because it ropes in Section 3 securities;
9 third, Section 12 refers to sales not only by
10 means of a prospectus but also by means of oral
11 communication, which would suggest that we're
12 outside the world of registration; and, fourth,
13 Section 12 creates liabilities for sellers who
14 had absolutely nothing to do with the
15 registration statement, so the class of people
16 who -- who might be liable is very different and
17 is not connected to the registration statement.

18 And what that suggests to me is that
19 the two provisions are targeting two very
20 different things, that one is targeting
21 dishonesty in creating a registration statement
22 and the other is targeting dishonesty in certain
23 kinds of sales, period, with or without a
24 registration statement.

25 So why am I wrong?

1 MR. HUNGAR: So Section 12 does refer
2 to the registration requirement not in so many
3 words, but, by definition, when you're talking
4 about a prospectus, a prospectus is directly
5 tied to the registration statement requirement.

6 Section 5 -- Section 5(b)(2) of the
7 Act specifically says that the obligation to
8 distribute a prospectus arises only with respect
9 to --

10 JUSTICE KAGAN: I think that was my
11 number three. It says prospectus or oral
12 communications. So we're clearly dealing in a
13 world here in which it might be a prospectus or
14 it might be something else.

15 MR. HUNGAR: Well, I'm trying to take
16 them one at a time, Your Honor.

17 The argument that Section 12 doesn't
18 refer to a prospectus -- to the registration
19 requirement is incorrect because liability is
20 predicated at least with respect to the first
21 part of the liability provision on the
22 prospectus requirement.

23 And, again, the prospectus requirement
24 is limited to and applies only with respect to a
25 security -- to any security with respect to

1 which a registration statement has been filed.

2 That is the definition -- "such
3 security" in Section 5(b) refers back to any
4 security with respect to which a registration
5 statement has been filed. And -- and -- and
6 such security is the only security as to which
7 there's an obligation to distribute a
8 prospectus.

9 And this Court said in Gustafson
10 that's what prospectus means in Section 12. It
11 means the prospectus that's referred to in
12 Section 5(b), which is to say any -- the
13 prospectus that has to be distributed for any
14 security with respect to a registration
15 statement has been filed.

16 So there is a clear and unambiguous
17 direct link between the prospectus in Section 12
18 and the registration statement in Section 5.
19 And only registered securities are subject to
20 that requirement. This Court said that in so
21 many words in Gustafson.

22 So, with respect to oral
23 communication, again, what this Court said in
24 Gustafson, what the courts of appeals have said
25 under noscitur a sociis or whatever that canon

1 of construction is, that oral communication
2 can't mean every oral communication because,
3 given the prospectus is limited to the
4 prospectus referenced in Section 5 and applies
5 only to registered shares, it would dramatically
6 expand the scope of liability in a bizarre way
7 if the only misrepresentations in a written --
8 in a writing that were actionable were in the --
9 in the prospectus applicable only to the
10 registered shares, but then, like, oral
11 communications opened the door to all sorts of
12 suits based on oral communications.

13 So this Court in Gustafson indicated
14 and the courts of appeals have consistently held
15 "oral communication" means an oral communication
16 relating to the prospectus, not some un-moored
17 type of oral communication. So, again, if it
18 has to relate to the prospectus, that means it's
19 tied to the registration requirement.

20 You asked about -- you made a Section
21 3 point. All I can say, as I've said before,
22 when Congress creates a liability provision that
23 on its face would not apply because -- to
24 exemptions because they're exemptions and then
25 it says, oh, but this particular category of

1 exemptions we want to bring back in to the scope
2 of liability, it is reasonable to infer that
3 they didn't bring in the other category of
4 exemptions, the Section 4 exemptions, that they
5 didn't include in that parenthetical as -- as
6 securities that are going to be covered by
7 Section 12, even though they're normally exempt.

8 And so the inclusion of one category
9 of exemptions and the exclusion of another
10 category of exemptions strongly supports the
11 conclusion that the second category of
12 exemptions remains exempt.

13 You had one other point.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 JUSTICE JACKSON: I'll just ask you
20 quickly, I've heard you say a couple of times
21 that there's an obligation to distribute a
22 prospectus or register, and I assume you mean a
23 legal obligation. And your brief does focus
24 heavily on that requirement, but I guess I'm
25 wondering about voluntary registration.

1 So can a company voluntarily register
2 exempt shares?

3 MR. HUNGAR: I mean, I suppose so.
4 Well, again, the exemption -- the Section 4
5 exemptions are transactional. So you could have
6 a share that is exempt in the hands of its
7 holder, that is, they would be legally entitled
8 to sell it, but they might choose to -- to have
9 it registered and ask the company to register it
10 along with, say, a registered offering of other
11 shares.

12 JUSTICE JACKSON: And isn't that
13 what's happening in the direct listing context
14 to some degree?

15 MR. HUNGAR: No, Your Honor.

16 JUSTICE JACKSON: No? Why?

17 MR. HUNGAR: Because they're not
18 registered. They're not -- and the shareholders
19 aren't asking -- I mean -- well, sorry. To be
20 clear, some shareholders did register their
21 shares. Those are registered shares. They had
22 to register those shares in order to sell them
23 because they were subject to restrictions.
24 Other shareholders --

25 JUSTICE JACKSON: But they started off

1 being exempt. I thought the direct listing, the
2 whole pool started off being exempt, and then we
3 had registration as part of it, and some of
4 those shares were designated as being registered
5 as part of the direct listing.

6 MR. HUNGAR: Not quite, Your Honor.

7 JUSTICE JACKSON: Okay.

8 MR. HUNGAR: Again -- and it's
9 confusing because the Section 4 exemptions are
10 transactional. So there were share -- before
11 the direct listing, there were certain large
12 shareholders or affiliates of the corporation
13 who owned shares, they had obtained those shares
14 from the corporation in an exempt offering -- I
15 mean an exempt transaction for that transfer
16 from the corporation to that initial category
17 of, you know, officers, directors, major
18 shareholders.

19 JUSTICE JACKSON: All right. So those
20 were exempt originally?

21 MR. HUNGAR: Well, but they weren't
22 exempt in the sense that there were restrictions
23 on their ability to sell them. Because they're
24 -- because they're in that category of officers,
25 directors, affiliates of the corporation, they

1 could not sell those shares publicly without
2 registering them.

3 JUSTICE JACKSON: Okay.

4 MR. HUNGAR: And, therefore, in the
5 direct listing, they registered those shares in
6 order to sell them. But other people who were
7 not affiliates, low-level employees, say, who
8 may have gotten a few shares as part of a
9 employee stock option program or something, they
10 are not subject to the same restrictions because
11 they're not affiliates of the company.

12 And under the SEC's rules determining
13 who is exempt and who isn't exempt, they were
14 entitled to sell their shares publicly even
15 before the direct listing, and they didn't --

16 JUSTICE JACKSON: Without registering
17 them?

18 MR. HUNGAR: Correct, without
19 registering.

20 JUSTICE JACKSON: Okay.

21 MR. HUNGAR: And they remained
22 entitled to do that after the direct listing.

23 JUSTICE JACKSON: So the ones who
24 registered them, do you concede that Section 11
25 liability attached at that point?

1 MR. HUNGAR: I mean, those are
2 registered shares, and, therefore, Section 11
3 applies to those shares, yes.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. HUNGAR: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Russell.

9 ORAL ARGUMENT OF KEVIN K. RUSSELL

10 ON BEHALF OF THE RESPONDENT

11 MR. RUSSELL: Mr. Chief Justice, and
12 may it please the Court:

13 Everyone agrees that "such security"
14 in Section 11 refers in some ways to the
15 registration statement challenged as misleading.
16 The question here is the precise nature of that
17 relationship.

18 Petitioners say "such security" refers
19 exclusively to what they call registered shares.
20 But the statute doesn't use that term or provide
21 a definition for it, and neither do Petitioners.

22 That might seem unnecessary because
23 one would think that a registered share is one
24 specified in the registration statement, but
25 registration statements do not specify

1 individual shares, as exemplified by the
2 examples of Petitioner Butterfield's shares that
3 we discuss in our brief.

4 Instead, what registration statements
5 do is they do not act at the individual -- at
6 the level of individual shares. Instead, they
7 act at the level of a public offering of
8 securities, not shares, that is, the planned
9 introduction of a group of fungible shares to
10 the market at a particular time.

11 The function of the registration
12 statement is to provide the market the
13 information it needs to value all of those
14 fungible shares in that public offering. And
15 the function of Section 11 is to provide
16 investors confidence that they can rely on the
17 integrity of that market price, even though some
18 of those shares could have been sold in some
19 other transaction without a registration
20 statement.

21 Accordingly, the better view is that
22 "such security" in Section 11 refers to all of
23 the shares in the public offering for which the
24 registration statement was a prerequisite.

25 Section 12 also uses the term "such

1 security," but unlike in Section 11, it has a
2 direct grammatical referent, the security sold
3 by means of a misleading prospectus.

4 By its terms, that provision applies
5 to a security, not a registered security. And
6 the prospectus here is exactly the kind of
7 document Gustafson held to be a prospectus
8 within the meaning of Section 12.

9 Congress expressly mentioned shares
10 exempt under Section 3 because it had to,
11 because Section 3 says Section 3 exempt shares
12 are not subject to any of the provisions of the
13 statute, including Section 12.

14 Section 4 does not operate in that
15 way. It exempts only from the specific
16 registration requirement. As a consequence,
17 there is no need for Congress to mention that.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Would you comment on
20 the tracing requirement? Mr. Hungar said -- I
21 believe he said it was always there. And I'd
22 like to see your -- have -- hear your reaction
23 to that.

24 MR. RUSSELL: Sure. What he is
25 referring to is a series of cases, starting with

1 Barnes, in which the Court said not that you
2 have to share -- not that you have to show that
3 you purchased a registered share, because all
4 the shares in -- in Barnes and all the cases
5 that followed were registered shares.

6 The question was, registered under
7 which registration statement? Were they
8 registered under the -- were they part of the
9 offering made possible by the allegedly
10 misleading registration statement, or had they
11 been issued previously, which is what happened
12 in Barnes, under a registration statement that
13 was not misleading?

14 Those courts do not address the
15 question here. They ask which registration,
16 which registration statement, which registered
17 offering, and sometimes they use that term.
18 They say you have to trace your shares to the
19 registered offering. None of them say you have
20 to show that you purchased a registered share
21 because it didn't matter in any of those cases.

22 And, indeed, the only case that they
23 cite to that even addresses this question of the
24 distinction between exempt and registered shares
25 is the Fifth Circuit's 2005 decision in Krim.

1 That is not the kind of circuit consensus that
2 Congress could have ratified.

3 And, instead, the proper understanding
4 of those cases is they are addressing a
5 different question. And if anything, they are
6 consistent with our view that the focus of
7 Section 11 is on the registered offering,
8 because everybody who purchases in that offering
9 is going to have their shares valued based on
10 that registration statement, whether the share
11 could have been sold in another kind of
12 transaction or not without a registration
13 statement.

14 JUSTICE THOMAS: The -- and, finally,
15 should Sections 11 and 12 rise or fall together?

16 MR. RUSSELL: No, they definitely do
17 not. They have very different language. The
18 textual ambiguity that arises in Section 11
19 comes from the fact that "such security" doesn't
20 have a grammatical referent. It does in Section
21 12. And it unambiguously refers to "a
22 security," not "a registered security."

23 My friend's reliance on Gustafson is
24 entirely misplaced. The Court wasn't
25 considering anything like this question there.

1 It was asking the relatively straightforward
2 question of what is a prospectus. And it held
3 that a prospectus is this formal kind of
4 document that get filed -- that gets filed with
5 a registration statement, not, you know,
6 provisions of a contract in a private -- in a
7 private transaction.

8 Of course, this is not a private
9 transaction. This is Slack's public -- initial
10 public offering. They issued billions of shares
11 to the public for the first time -- or they sold
12 billions of dollars' worth of shares to the
13 public for the first time here. It is the core
14 thing that the '33 Act is designed to regulate.

15 But they claim to have found a way to
16 get out of Section -- Section 11 liability not
17 only in this special context about direct
18 listings but even in the more typical and much
19 more consequential context of regular IPOs,
20 because you cannot -- I don't think this Court
21 can write a decision adopting their
22 interpretation without opening the door to
23 issuers allowing some exceptions to their lockup
24 rules that would result in the immediate
25 introduction of exempt shares at the same time

1 as the IPO shares.

2 JUSTICE KAGAN: What -- what is your
3 understanding, Mr. Russell, of why that hasn't
4 happened before now? Because I would think, if
5 this is an unsettled question, somebody would
6 have tested exactly that. You -- you know, just
7 in a regular IPO, you also include some
8 unregistered shares. But we haven't seen that.
9 Why not?

10 MR. RUSSELL: You haven't seen that,
11 and the important thing is we haven't seen any
12 cases saying you can do that either. You know,
13 Petitioners insist that this has been settled
14 for a long time, that they absolutely have the
15 right to -- to engage in this kind of stratagem.
16 But every time they say that, they don't cite
17 any cases. They --

18 JUSTICE KAGAN: I mean, do you know of
19 any issuers that have done that?

20 MR. RUSSELL: Certainly, I am aware
21 the SEC in that 2020 order notes in a footnote
22 that not every lockup period has -- you know,
23 that some lockup periods have exemptions. I'm
24 not sure -- I'm not aware, to answer your
25 question, of anybody raising this argument in

1 the post-lockup period context. I suppose --

2 JUSTICE KAGAN: But you think that
3 there would be no distinction between the two in
4 terms of the law that's being argued about here?

5 MR. RUSSELL: I don't see how you
6 could. Their position is that as soon as exempt
7 shares enter the market, you have to trace and
8 show that the shares that you identified are
9 registered shares and not exempt shares. And
10 that -- there's no difference between the
11 post-IPO lockup period and a direct listing in
12 that respect.

13 And they insist, and the Fifth Circuit
14 in Krim has held, that that's impossible to do,
15 that as soon as it enters the share, that
16 share's getting to legal, including in the share
17 depository and -- and -- and -- and in the
18 books, the street listings and brokers, and at
19 the very least, even if it's not completely
20 impossible to conduct that kind of tracing, it
21 is surely exceedingly burdensome and --

22 JUSTICE KAVANAUGH: When -- keep
23 going. Sorry.

24 MR. RUSSELL: Exceedingly burdensome
25 not only for the parties but also for the courts

1 and the juries who are going to have to
2 determine the registration status of perhaps
3 millions of individual shares of stocks and on
4 the third parties who will be subject to
5 discovery, the -- the brokers, the share
6 depositories, in order to engage in this -- this
7 exercise.

8 JUSTICE KAVANAUGH: One of the things
9 that's said on the other side and in the amicus
10 briefs, I think, is that you have a problem,
11 going the other direction from the status quo,
12 that in a typical IPO, the issuer's liability
13 ends with the end of the lockup period. But
14 your theory, if we were to accept it, in
15 Section 11 cases, would allow liability to go on
16 even after the lockup period?

17 MR. RUSSELL: So two things about
18 that. I think there are things that they can do
19 to -- to cut the liability off, but they don't
20 cite any cases for the proposition that they get
21 to cut the liability off either. And they
22 certainly don't cite any cases that --

23 JUSTICE KAVANAUGH: But that would
24 be -- just the premise, that would be a big
25 change from the status quo --

1 MR. RUSSELL: No.

2 JUSTICE KAVANAUGH: -- in IPO, right?

3 MR. RUSSELL: They have not
4 established that that is the general rule in
5 IPOs --

6 JUSTICE KAVANAUGH: Okay.

7 MR. RUSSELL: -- that you get to cut
8 off that liability in that way. It may be the
9 practice in some lower courts. It is not.
10 There's no circuit consensus about that, and,
11 certainly, this Court hasn't held.
12 But what they --

13 JUSTICE BARRETT: Do you see a lot of
14 suits that we're not seeing, kind of to Justice
15 Kavanaugh's point?

16 MR. RUSSELL: The cases where people
17 are including the post-lockup IPOs --

18 JUSTICE BARRETT: Yeah.

19 MR. RUSSELL: -- shares in them?

20 JUSTICE BARRETT: Yeah.

21 MR. RUSSELL: I don't know. I mean,
22 nobody has cited this Court cases one way or the
23 other about that body of cases.

24 I will say what issuers --

25 JUSTICE BARRETT: Maybe --

1 MR. RUSSELL: -- can do --

2 JUSTICE BARRETT: -- it's because
3 people think they can't bring them. I mean, it
4 seems kind of -- to Justice Kavanaugh's point,
5 the status quo is that after the lockup period
6 ends, these suits don't go forward under Section
7 11.

8 MR. RUSSELL: But -- well, two things
9 about that. One thing, I think, even on our
10 view of the statute, that an issuer can do is
11 withdraw the registration statement at the end
12 of the lockup period. Slack did something
13 similar in this case. After 90 days, they
14 withdrew the registration statement. And so
15 that provides them that kind of protection.

16 The difference between that solution
17 and what they're proposing is that if you adopt
18 their view, they don't only cut off liability
19 after the end of the lockup period; they can,
20 simply by having a limited exception to the
21 lockup period on day one, eliminate all
22 liability altogether, including for all the
23 shares in the IPO, because as soon as they let a
24 single share, exempt share, onto the market,
25 which they can easily do, it doesn't harm their

1 interest of the underwriters because they don't
2 have to let enough in that's going to affect the
3 share price, as soon as they let in even a small
4 number of shares, we've got this intermingling
5 that they say requires tracing that they say is
6 impossible to do, and the Fifth Circuit has
7 agreed.

8 You know, they've been a little bit
9 careful about how hard they think tracing is in
10 this Court, but you can rest assured that if
11 this Court issues a decision in their favor,
12 they're going to be arguing to the lower courts
13 that you need to adopt the position in Krim, and
14 -- and then we'll be at the end of it. And
15 there are only --

16 JUSTICE SOTOMAYOR: So let me ask you,
17 if we find -- if we find tracing is required,
18 then we should do what they want, reverse,
19 because you can't prove tracing?

20 MR. RUSSELL: No. I -- I think you
21 should leave it to the lower court. It is
22 true -- you know, we pled in our complaint that
23 the shares were traceable.

24 But we did say during the briefing
25 that if what that means is we have to show the

1 exemption status of every share that my client
2 purchased, we couldn't do that. And I think you
3 can just leave it up to the lower courts to say
4 whether that precludes us from being able to
5 take advantage of additional briefing --

6 JUSTICE SOTOMAYOR: Because I was
7 seeing the numbers. You could prove that a
8 certain percentage of your stock had to be
9 registered, correct?

10 MR. RUSSELL: I certainly think we can
11 meet the Iqbal and Twombly standard --

12 JUSTICE SOTOMAYOR: Right.

13 MR. RUSSELL: -- by showing that it is
14 not only plausible but virtually certain that my
15 client purchased some registered shares, and I
16 think that's all you have to do to establish
17 standing. Everything else is a damages
18 question.

19 JUSTICE JACKSON: Can I ask about your
20 Section 11 argument? Because I thought I
21 understood you to say in your brief that "such
22 securities" includes shares that the
23 registration statement allows to be sold but not
24 if the registration statement merely informs the
25 share's valuation.

1 Is that your position? And how do you
2 draw that line, or where does it come from?

3 MR. RUSSELL: No, I -- I don't -- I'm
4 -- I apologize if we gave that impression.

5 JUSTICE JACKSON: Okay.

6 MR. RUSSELL: Our position is that,
7 look, Section 11 is agnostic to why you have a
8 registration statement.

9 JUSTICE JACKSON: Okay.

10 MR. RUSSELL: The point of Section 11
11 is, once there's a registration statement, all
12 the shares in the public -- in the public
13 offering that required that registration
14 statement in order to go forward are going to be
15 valued on the basis of that registration
16 statement.

17 And it is completely understandable
18 that Congress would have then said that
19 everybody who buys shares that are based on a
20 price that is inflated or deflated because of a
21 misstatement should have a remedy.

22 JUSTICE JACKSON: So does it matter --
23 my understanding in this particular case is that
24 the direct listing itself registered certain
25 shares or said that some subset of all the

1 shares that were going on the market would be
2 registered and others weren't.

3 So what do we do with that fact in
4 light of your argument?

5 MR. RUSSELL: I think that one of the
6 benefits of our argument is it gets away from
7 this question of having to look at a
8 registration statement and say which shares are
9 registered and which aren't.

10 In our view, so long as the shares
11 were part of a public offering for which a
12 registration statement was required, that
13 section only --

14 JUSTICE JACKSON: No, I understand
15 that, but don't you have to -- don't you have to
16 persuade us that that's what Congress --

17 MR. RUSSELL: Yes.

18 JUSTICE JACKSON: -- intended with
19 respect to Section 11?

20 And so why is it that you can have a
21 world in which the registration statement speaks
22 to certain shares as registered and certain as
23 not and, under your view, still implicate, all
24 of them, implicate Section 11?

25 MR. RUSSELL: So two responses to

1 that. One is I think a premise of your question
2 is that registration statements identify
3 specifically identifiable shares, and that's not
4 the case.

5 So, if you look at the Slack
6 registration statement here and look at the
7 shares of CEO Butterfield, they say he has 41
8 million shares and he's registering 11 million
9 of them.

10 There's no way you can tell from that
11 registration statement which are the 11 million
12 and which are the 30 million that aren't
13 registered. Yet they would have my client have
14 to prove, even though we know for sure, even if
15 he paid \$40 directly to Mr. Butterfield and got
16 a share, he could not tell whether that share
17 was registered under this registration statement
18 or not, and that's because registration
19 statements pave the way for public offerings.
20 They do not register individual shares.

21 JUSTICE GORSUCH: Counsel --

22 CHIEF JUSTICE ROBERTS: Well, he
23 can't -- the reason he can't is because the
24 statute says "such security." I mean, that's
25 the big hurdle for you to get over.

1 I don't think the -- unless your
2 argument is, and I'm not dismissing it in any
3 sense, but it's simply a practicality argument,
4 you say that Congress must have intended
5 everybody to be able to sue and that we should
6 not be too punctilious about looking at "such"
7 in "such security."

8 MR. RUSSELL: No, we acknowledge "such
9 security" requires a relationship with the
10 registration statement. My point I was just
11 making is that they have this idea of what a
12 registered share is, which, in order to work,
13 requires registration statements to identify
14 specific individual shares, and they don't.

15 You know, if my client knew that he
16 had a particular share, if he got a paper
17 certificate, he could not look at the
18 registration statement and tell whether that's a
19 registered share or not because the registration
20 statement does not say which of
21 Mr. Butterfield's 40 million shares are
22 registered and which aren't, and that's a
23 problem.

24 The -- the -- the -- the broader point
25 about "such security," though, is that, you

1 know, their premise is that Section 11 is
2 enforcing the obligations of Section 5 and 4,
3 and that's simply incorrect.

4 Section 4 and 5 describe the
5 obligations of share owners and describe the
6 conditions under which they can sell their
7 shares lawfully. Section 11 doesn't say
8 anything about lawful shares and it doesn't say
9 anything about the duties of sellers. It
10 instead addresses the obligations of people who
11 write registration statements and says to them
12 that you've got to be accurate.

13 And then the question simply becomes,
14 what is the scope of the remedy provided when
15 that doesn't happen? And we don't think that
16 you can just transport a set of distinctions
17 that were put into the statute to govern the
18 obligations of sellers and when they can sell to
19 that context.

20 It makes perfect sense that Congress
21 would have understood that a registration
22 statement speaks to all of the -- the valuation
23 of all of the shares in the registering -- in
24 the registered offering for which it would file,
25 and it's going to injure everybody who purchases

1 in that public offering.

2 JUSTICE GORSUCH: You -- you spoke
3 a -- a few moments ago and in the briefs too a
4 bit about this traceability requirement or
5 Section 11 is a standing question, and I -- I
6 just want to clear that up because I -- I -- I
7 for one don't quite see it that way.

8 It seems to me like it's part of the
9 cause of action under Section 11, not -- it
10 doesn't go to the question of constitutional
11 injury and -- in fact.

12 And so, yes, all you'd need to do is
13 plead facts suggesting that you can trace
14 consistent with the Twiqbal standard, as my
15 friends like to call it.

16 (Laughter.)

17 JUSTICE GORSUCH: And -- and then
18 you're off to the races and it really just
19 becomes a matter of damages, as I think you also
20 alluded to. Is -- is that right?

21 MR. RUSSELL: That's right. I don't
22 think anybody is saying that it's a matter of
23 Article III standing. They use the phrase
24 "statutory standing."

25 JUSTICE GORSUCH: Statutory standing.

1 MR. RUSSELL: But I don't know that's
2 any different than, you know, part of a cause of
3 action.

4 JUSTICE GORSUCH: Cause of action.

5 MR. RUSSELL: The critical thing,
6 though, is that it is not part of the cause of
7 action that in order to get into the door and to
8 proceed with the case, you've got to be able to
9 show every --

10 JUSTICE GORSUCH: No, I --

11 MR. RUSSELL: -- the registration
12 status of every share.

13 JUSTICE GORSUCH: -- I -- I understand
14 your position on that. But, if we were to rule
15 against you on what Section 11 means, it still
16 would enable you to plead, and we're only at the
17 12(b)(6) stage here, that there are traceable
18 shares --

19 MR. RUSSELL: Yes.

20 JUSTICE GORSUCH: -- and -- and
21 plausible facts suggesting some traceable
22 shares. That's all that would be required.

23 MR. RUSSELL: That is correct, and
24 that's why, you know, we think, if you adopt our
25 interpretation of Section 11, you should disavow

1 any suggestion that they are entitled to -- to
2 affirmance of their motion to dismiss at this
3 stage because we surely satisfied Twiqbal or
4 however you word it.

5 JUSTICE KAVANAUGH: Can't we leave
6 that to the court of appeals to decide whether
7 it was forfeited or not?

8 MR. RUSSELL: Certainly. So I'm
9 addressing, I think, two different questions.

10 JUSTICE KAVANAUGH: Yes.

11 MR. RUSSELL: There -- there is a
12 forfeiture argument, and I think you leave that
13 to the court of appeals.

14 JUSTICE KAVANAUGH: Yeah.

15 MR. RUSSELL: There is a separate
16 argument about why, you know, maybe you would
17 affirm because we can't -- because, under your
18 interpretation --

19 JUSTICE KAVANAUGH: Yes.

20 MR. RUSSELL: -- that requires
21 registration, we don't meet Iqbal and Twombly,
22 and I think you should reject that.

23 JUSTICE KAVANAUGH: More -- more
24 broadly, I think the suggestion on the other
25 side and, certainly, the amicus briefs is that

1 this is a new thing, direct listings, and to
2 take your position here, we would have to depart
3 on Section 11 from a lot of law, starting with
4 Judge Friendly, that's been around for a long
5 time.

6 And rather than doing that -- this is
7 their suggestion -- we should leave it to the
8 SEC and/or Congress rather than ourselves, kind
9 of departing from that longstanding body of law.

10 So that's kind of an institutional
11 argument of sorts that they're suggesting leave
12 it to the SEC, and I just want to make sure you
13 can respond to that.

14 MR. RUSSELL: Thank you. I appreciate
15 that.

16 We strongly dispute the premise. The
17 body of law that they are describing does not
18 hold that plaintiffs have to show that every
19 share they purchased was registered or not.

20 The body of law that they are pointing
21 to simply says you have to show that you
22 purchased under the registered offering that was
23 governed by the registration statement that you
24 said was misleading as opposed to issued under
25 some registration statement a few years earlier

1 that could have been entirely accurate. None of
2 those cases decide the question presented here.

3 Sometimes they use language about
4 registered shares, but it doesn't matter. It
5 didn't matter in that case because they weren't
6 drawing a distinction between registered shares
7 and exempt shares that were issued as part of a
8 registered offering because it simply didn't
9 matter in that case.

10 If I could turn again to Section 12
11 for a moment, you know, I do think that the
12 plain language of the statute just directly
13 answers the questions here. This is not at all
14 surprising that Congress would say that if you
15 use a misleading prospectus to sell a security,
16 it doesn't matter whether you're using it to
17 sell a registered security or a -- an exempt
18 security. It causes the same harm.

19 And, of course, in a case where you
20 have an intermingling of exempt and what they
21 call registered securities, anybody who is
22 offering those securities for sale is going to
23 make use of that prospectus because they have no
24 way of knowing if they are offering and -- and
25 advertising and marketing registered shares or

1 not, and in all likelihood, the people are going
2 to buy some of both.

3 But the harm that Section 11 or
4 Section 12, I apologize, is directed against
5 surely arises whenever that prospectus is used
6 to -- to market securities in that way.

7 And I don't understand any reason why
8 our -- my friends think that the parenthetical
9 that represent -- that references Section 3 was
10 necessary in order to make clear that exempt
11 shares are a security. Clearly, an exempt
12 security is a security.

13 JUSTICE KAVANAUGH: If you were to
14 lose on Section 11 -- I'm not saying you're
15 going to, but if you did -- the discussion we
16 had earlier about leaving then Section 12 to the
17 court of appeals -- because I think you raised
18 good arguments on Section 12. The other side
19 raised good arguments about Gustafson. We don't
20 have the SEC. We don't have a lot of case law.
21 I'm, speaking only for myself, a bit concerned
22 saying too much on Section 12 without more
23 confidence about what we're doing.

24 MR. RUSSELL: You know, we are the
25 Respondents. We didn't want you to take either

1 question --

2 (Laughter.)

3 MR. RUSSELL: -- you know, and we're
4 happy for you to leave the status quo the way it
5 is. I do think it is an entirely
6 straightforward textual question.

7 JUSTICE KAVANAUGH: Well --

8 MR. RUSSELL: And I do think,
9 if you're concerned about -- I apologize.

10 JUSTICE KAVANAUGH: -- the -- it's
11 not, but anyway, keep going.

12 MR. RUSSELL: All right. But I would
13 say that, you know, if you're concerned about
14 getting this right without the benefit of the
15 views of -- of the SEC, you should consider
16 DIG-ing the entire case, because I don't think,
17 you know, that the concerns that you have about
18 the correctness of the parties' interpretations
19 of Section 12, I think, arise with respect to
20 Section 11 as well, because they are -- again,
21 the entire premise of their argument is that the
22 world is divided into exempt shares and
23 registered shares and Section 11 applies -- and
24 exempt shares are exempt from essentially
25 everything in the statute.

1 Section 3 does do that. Section 3
2 identifies a body of shares that are exempt from
3 nearly everything except Section 12 in the
4 statute. Congress didn't do that for Section 4.
5 Section 4 simply, as I said before, addresses
6 when certain shares can be sold and in certain
7 kinds of transactions. It is not an overall
8 status that it bestows on individual shares and
9 exempts them from everything in the statute.

10 JUSTICE KAVANAUGH: It's odd that the
11 SEC is not here. Mr. Hungar -- given how they
12 come in in our other cases, Mr. Hungar suggests
13 the reasonable inference on Section 11 is that
14 they -- they've stated their position before.
15 But I just want you to give us your response to
16 that.

17 MR. RUSSELL: Okay. I have no idea
18 why they're not here. I will -- but I can say
19 with great confidence that the position they
20 expressed before is not a position that directly
21 translates to this case. They are simply
22 doing -- they expressed the position that Barnes
23 adopted, which is that you have to trace your
24 shares that you purchased to the registered
25 offering that it governed by the misleading

1 registration statement, not to some other
2 offering that may have had a perfectly fine
3 registration statement.

4 JUSTICE SOTOMAYOR: I have read some
5 commentators suggesting that the SE -- the SG is
6 having trouble with this case and doesn't know
7 what to do.

8 MR. RUSSELL: I --

9 JUSTICE SOTOMAYOR: Do you have any
10 indication of that?

11 MR. RUSSELL: I -- I -- I'm sorry. I
12 just don't know. They haven't --

13 CHIEF JUSTICE ROBERTS: May not be the
14 only one.

15 (Laughter.)

16 MR. RUSSELL: I will say, you know,
17 there is this question of, you know, can
18 Congress or the SEC fix this? Certainly, I
19 think there would be something to fix because,
20 again, the practical consequence of adopting
21 Petitioners' position, I think, is inevitably
22 going to open the door to this -- their
23 strategem of letting in a few exempt shares,
24 even in traditional IPOs, and arguing that,
25 therefore, you have to trace. And that's

1 generally going to be impossible. And so --

2 JUSTICE SOTOMAYOR: In Footnote 7 of
3 your brief, you acknowledged that there is an
4 argument that the NYSE rule requires that all
5 securities sold in a direct listing be covered
6 by the registration statement and presumably by
7 the prospectus as well. But you acknowledge you
8 waived that argument.

9 MR. RUSSELL: That's correct. We did
10 not raise that --

11 JUSTICE SOTOMAYOR: Why isn't that a
12 foundational question or a critical question
13 with respect to whether we impose a tracing
14 requirement on you in this direct listing
15 context?

16 MR. RUSSELL: I do think it is a
17 critical question because it'll mean that if you
18 were to issue a decision in Respondent's favor
19 in this case, it may not matter in the direct
20 listing context. And the only effect of the
21 decision then would be with respect to this much
22 more common, much more consequential, and
23 under-briefed issue about what happens after the
24 expiration of a lockup period in a traditional
25 IPO.

1 You know, it is unfortunate that we
2 did not raise this below and -- or before, and
3 we're not asking the Court to rule on it now.
4 We recognize that that would be unfair. But we
5 do want the Court to be aware of this question
6 and not to say anything in -- in its opinion --

7 JUSTICE SOTOMAYOR: Might -- might be
8 --

9 MR. RUSSELL: -- prejudging that.

10 JUSTICE SOTOMAYOR: -- a ground to
11 DIG, no?

12 MR. RUSSELL: I'm sorry?

13 JUSTICE SOTOMAYOR: Might be another
14 ground to DIG?

15 MR. RUSSELL: It might be. I -- I can
16 certainly understand why the Court would do that
17 in your -- I'm in a poor position to suggest
18 that you do that because we didn't raise this in
19 the brief in opposition. So we do think at the
20 very least, though, that the Court should leave
21 that -- that open and that should be something
22 that can get percolated, and that may end up
23 resolving the actual question in the context of
24 direct listings.

25 And, again, I do think it is a very

1 serious consequence of their position that
2 you're going to create a pathway for evasion of
3 Section 11 in the context of traditional IPOs.

4 Their response isn't that that's
5 wrong; it's that that's right and we've always
6 had that right. That is wrong. Their other
7 response is don't worry about it because there's
8 always Section 10(b). You know, that, I think,
9 is an inadequate response, including because the
10 whole reason Congress enacted Section 11 it
11 because it thought the common law cause of
12 action for fraud that existed before the Great
13 Depression it inadequate. It's not something
14 that Section 10 provides --

15 JUSTICE SOTOMAYOR: Counsel, I think
16 you've answered my question. I --

17 MR. RUSSELL: I apologize. But it --
18 I'm sorry.

19 CHIEF JUSTICE ROBERTS: Anything
20 further?

21 Justice Thomas?

22 Justice Alito?

23 JUSTICE KAGAN: I wanted to make sure,
24 Mr. Russell, I understood your textual argument,
25 because it does seem to me like you have a hard

1 row to hoe here. Granted, "such security"
2 doesn't have an antecedent, but why shouldn't we
3 read it Mr. Hungar's way?

4 MR. RUSSELL: Two reasons. One, Mr.
5 Hungar's way requires you to be able to identify
6 specific shares as registered by the
7 registration statement. As the Butterfield
8 example shows, you cannot do that. And --

9 JUSTICE KAGAN: How -- how about when
10 -- when -- when it talks about the registration
11 statement becoming effective and then it
12 switches over to Section 6 and it says a
13 registration statement shall be deemed effective
14 only as to the securities specified therein?
15 Why aren't we talking about those securities?

16 MR. RUSSELL: Because the word
17 "security" there is not "share," and it is not
18 referring to individual shares, including
19 because registration statements don't specify
20 individual shares.

21 If you look at Section 7, which then
22 lists what goes into the registration statement,
23 it refers to Schedule A. Schedule A doesn't say
24 that you have to identify specific shares. The
25 closest it comes is in subparagraph 11, which

1 says you have to identify the amount of capital
2 stock, an aggregate question, not individual
3 shares. If you look at the extensive SEC
4 regulations about what goes into a registration
5 statement, it also doesn't require you to
6 identify individual shares. And as I said
7 before and as the Butterfield example shows,
8 this registration statement doesn't identify
9 individual shares.

10 But I will say, even if you thought
11 that it made sense to talk about registered
12 shares and you could identify them and you knew
13 what they were, it is nonetheless the case that
14 Section 11, I think, simply doesn't follow that
15 line of distinction. That's a line of
16 distinction about the lawfulness of sales. It
17 is about the obligations of sellers. Section 11
18 is about the obligations of people who write --
19 who write registration statements. And it is
20 not at all strange, when we know that every
21 share in a registered offering is going to be
22 valued or misvalued based on what's said in that
23 registration statement -- it's not at all
24 unusual to think that Congress would provide a
25 remedy to everyone who is foreseeably injured.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 Thank you, counsel.

8 MR. RUSSELL: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal,
10 Mr. Hungar.

11 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR
12 ON BEHALF OF THE PETITIONERS

13 MR. HUNGAR: Thank you, Your Honor.
14 Just a few brief points.

15 First, some factual corrections.

16 Slack did not withdraw its registration
17 statement. It merely withdrew it with respect
18 to unsold shares. So the registration statement
19 remained in effect. And under Respondent's
20 interpretation, there would be no end to the
21 liability potential for -- for companies that
22 issue registration statements for the full
23 three-year period of the -- the statute of
24 repose, which would dramatically change the
25 consensus.

1 Mr. Butterfield, another affiliate to
2 the company, could not sell unregistered shares.
3 So, if they registered only some of their
4 shares, only those could be sold. That's
5 because it would be illegal to sell unregistered
6 shares because of the exemption that only
7 applies for affiliates only applies to the
8 shares that are -- or, rather, there is no
9 exemption for them to sell. They'd have to be
10 registered in order to sell. So only the
11 registered shares, so there's no difficulty
12 determining whether he sold registered shares.

13 Barnes did involve exempt shares as
14 well as registered shares that were already in
15 the market. The case makes that clear.

16 Counsel says that there's no consensus
17 on Section 11. That's simply incorrect. Every
18 court of appeals that had -- had addressed the
19 question, eight courts of appeals, said that
20 what "such security" means in Section 11 is
21 shares registered under the registration
22 statement that's being challenged.

23 And that means, as everyone has
24 understood for the past many decades, that in
25 the case of an IPO, once there are exempt shares

1 on the market, the plaintiff must trace in order
2 to bring a Section 11 claim. And as I said at
3 the beginning, Respondent does not cite a single
4 case to the contrary in the 90-year history of
5 the Act. So the idea that somehow the norm is
6 that people can bring suits in those
7 circumstances is patently incorrect.

8 The SEC has -- counsel suggests that
9 the SEC's position is not clear and does not
10 address the question at issue here. That's
11 simply incorrect. Here's what the SEC told this
12 Court in the Herman & MacLean case: A plaintiff
13 may seek relief under Section 11 only with
14 respect to securities covered by the
15 registration statement.

16 There's no doubt, and, in fact, the
17 Court -- the SEC actually went on to say, even
18 though there could be outstanding securities of
19 the same class, that there would still not be
20 liability even if people had relied on the
21 registration statement with respect to those
22 other shares. So the SEC's position is
23 perfectly clear.

24 Respondent says that this was a public
25 offering of the exempt shares. That's simply

1 not true. If you look at Gustafson, Gustafson
2 defines what a public offering is.

3 A public offering is -- an offering is
4 by -- by an issuer or a controlling shareholder.
5 That's what Gustafson says. And that's exactly
6 the point that Gustafson is making,
7 distinguishing -- distinguishing between the
8 public offerings that are covered by Section 12,
9 public sales, public offerings that require a
10 registration statement and that -- that are by
11 issuers, controlling shareholders, underwriters
12 and the like, as distinct from the exempt shares
13 that are not public offerings because they're
14 exempt under Section 4, which carves out that
15 different class of offering -- of offerings for
16 different treatment, including under Section 12.

17 If the Court has no further questions,
18 I thank the Court, and we ask that the judgment
19 be reversed.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. Counsel.

22 The case is submitted.

23 (Whereupon, at 12:55 p.m., the case
24 was submitted.)

25

Official - Subject to Final Review

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