SUPREME COURT
OF THE UNITED STATES

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.   )

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Pages: 1 through 81

Place: Washington, D.C.

Date: April 17, 2023

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11   Washington, D.C.

12   Monday, April 17, 2023

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14   The above-entitled matter came on for oral

15   argument before the Supreme Court of the United

16   States at 11:44 a.m.

17

18   APPEARANCES:

19   THOMAS G. HUNGAR, ESQUIRE, Washington, D.C.; on behalf

20   of the Petitioners.

21   KEVIN K. RUSSELL, ESQUIRE, Washington, D.C.; on behalf

22   of the Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:44 a.m.)

3   CHIEF JUSTICE ROBERTS: Mr. Hungar.

4   ORAL ARGUMENT OF THOMAS G. HUNGAR

5   ON BEHALF OF THE PETITIONERS

6   MR. HUNGAR: Thank you, Mr. Chief

7   Justice, and may it please the Court:

8   Sections 11 and 12 of the '33 Act

9   expressly reference and enforce the registration

10   statement and prospectus requirements imposed by

11   Section 5 of the Act, 15 U.S.C. 77e. In

12   construing the term "such security," therefore,

13   it's appropriate to look to the meaning of that

14   same term as used in Section 5, the source of

15   the prohibitions enforced by Sections 11 and 12.

16   And it's undisputed that "such security" in

17   Section 5 consistently refers only to shares

18   that are subject to registration, never to

19   exempt shares. "Such security" in Sections 11

20   and 12 should be given the same meaning.

21   That reading is confirmed by this

22   Court's decision in Gustafson, which held that

23   it's more reasonable to interpret the liability

24   provisions of the '33 Act as providing remedies

25   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 -- it's -- there's no doubt that Congress

21   intended and required there to be tracing and

22   expected 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   is -- 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 the -- the -- a core

23   rationale of the Court's decision in Gustafson,

24   as I said, is that the -- the liability

25   provisions imposed by Sections 11 and 12 should

 1   be construed co-extensively with the obligations

 2   they enforce. The obligations they enforce

 3   arise under Section 5, which imposes an

 4   obligation to register particular securities,

 5   the shares that -- that have to be registered,

 6   and requires a prospectus to be delivered only

 7   in connection with particular securities,

 8   namely, registered 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 -- that congressional silence with respect

17   to 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 it's -- Section

22   12 itself states that it applies to most

23   securities exempt under Section 3. But Section

24   4 really 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 the -- what

12   the Court was saying in -- 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   JUSTICE BARRETT: Could --

 5   MR. HUNGAR: -- which is what we're

 6   talking about here.

 7   JUSTICE ALITO: Were you required to

 8   issue a prospectus in order to do the direct

 9   listing?

10   MR. HUNGAR: Yes, because the

11   prospectus and registration requirement are --

12   are co-extensive.

13   JUSTICE ALITO: Right.

14   JUSTICE KAVANAUGH: The questions that

15   Justice Gorsuch is asking and Justice Sotomayor

16   about 12(2) raised for me a question, which is

17   there's a lot of law out there about Section 11

18   and starting with Judge Friendly's opinion

19   and -- and going all the way down.

20   There's not a lot of law out there on

21   the Section 12 issue, and I'm a bit concerned

22   about deciding that issue without the SEC here,

23   without more law out there, without knowing more

24   about the Section 12 issue. So I'll just --

25   that's what I'm thinking.

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 1              MR. HUNGAR:  Your Honor, the Section

 2     12 issue has not come up very much because of

 3     limitations on Section 12 in other respects, I

 4     think, but this Court's decision in Gustafson --

 5              JUSTICE KAGAN:  Could you explain that

 6     when you have a moment?  I don't want to take

 7     you away from -- why hasn't the Section 12 issue

 8     come up?

 9              MR. HUNGAR:  Okay.

10              JUSTICE KAVANAUGH:  So take it now.

11              (Laughter.)

12              MR. HUNGAR:  Okay.  Yeah.  I think --

13     so there have been some cases, and the -- and

14     the cases since Gustafson --

15              JUSTICE KAVANAUGH:  Don't forget mine.

16              MR. HUNGAR:  There have been some

17     cases, and the cases since Gustafson have agreed

18     with our position as -- as I understand it, but

19     it's not a lot of cases, and -- and -- previous

20     to Gustafson, I mean, Section 12 has the privity

21     requirement, which in many jurisdictions imposes

22     a substantial limitation.  The district court in

23     this case took a different approach.  So that

24     constrains the number of -- of cases that can be

25     brought.
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1   In the old days before this Court made

2   clear that Section 10(b) has a scienter

3   requirement and -- and made clear that there's

4   a -- a comparable statute of limitations, 10(b)

5   was a much more popular route than Sections 11

6   or 12. They just -- they just don't come up

7   nearly as much as Section 10(b).

8   10(b) is the primary securities law

9   civil cause of action, and that's -- the vast

10   majority of the cases arise under that, which is

11   another reason why the sky is not going to fall

12   if this Court adheres to the course of the last

13   90 years in this case.

14   JUSTICE KAVANAUGH: Would a -- can you

15   go back to mine then?

16   MR. HUNGAR: I'm sorry, Your Honor,

17   could you remind me of the question?

18   JUSTICE KAVANAUGH: I figured that was

19   going to happen.

20   JUSTICE KAGAN: Sorry.

21   JUSTICE KAVANAUGH: That's what

22   happens.

23   Why not allow the lower courts to sort

24   out the Section 12 issue before we give a

25   definitive ruling on that?

 1   Because I feel, in looking at this, on

 2   Section 11, there's a lot of law. The SEC's

 3   position's been out there for a long time. A

 4   lot of cases. We don't really have that on --

 5   on Section 12. And I guess I'm just worried

 6   about making a mistake on Section 12 one way or

 7   another because we don't have the kind of

 8   thorough consideration we usually have before we

 9   give a definitive opinion on something.

10   MR. HUNGAR: Well, the one thing that

11   the district court and the court of appeals got

12   right in our view is -- is the fact that "such

13   security" should be construed the same in both

14   provisions.

15   JUSTICE KAVANAUGH: So that's a great

16   point for you, but as Justice Gorsuch points

17   out, I think the reference is not -- there are

18   differences between 11 and 12 over the exact

19   same language, and maybe you ultimately win on

20   that or maybe you don't, but that strikes me as

21   a big issue for these direct listings and

22   something that I'm not sure we're fully equipped

23   at this moment to chime in on.

24   MR. HUNGAR: I think the Court's

25   decision in Gustafson answers these questions.

1   The -- the -- the -- the fundamental logic --

2   JUSTICE KAVANAUGH: I read it a lot,

3   and I -- and I didn't come away with, like, this

4   is the clear answer to the Section 12 issue.

5   MR. HUNGAR: But -- but, Your Honor,

6   the -- the --

7   JUSTICE KAVANAUGH: Maybe I -- maybe I

8   should have.

9   MR. HUNGAR: -- the fundamental logic

10   of the Gustafson decision is that Section 12(2)

11   is -- 12(a)(2) is limited to public offerings,

12   that is, sales, public sales by the issuer, the

13   controlling shareholders, underwriters, that --

14   that category. It doesn't extend to the other

15   kinds of sales of securities which the Act

16   describes --

17   JUSTICE KAGAN: If we put --

18   MR. HUNGAR: -- which are exempt

19   transactions.

20   JUSTICE KAGAN: -- if we put Gustafson

21   aside for just a second, I mean, everything

22   about Section 12 reads differently from Section

23   1. There's absolutely no reference to

24   registration. The "such security" language does

25   not refer back to -- to registration in any way.

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1          It talks about prospectuses, but it

2     also talks about -- oral communications, which

3     suggests that it's broader than the registration

4     context.  And, you know, it has the specific

5     exemption.  So there's -- there's really nothing

6     in Section 12 that makes it like Section 11.

7          MR. HUNGAR:  Well, I mean, putting

8     aside Gustafson kind of ties one arm behind my

9     back.

10          JUSTICE KAGAN:  No, I mean, you know,

11     because there's a -- there's a -- there's

12     different views of exactly how far Gustafson

13     went in what it says.  And one view is Gustafson

14     is just talking about what a prospective means,

15     and it's not talking about this question of what

16     it means to, you know, by means of a prospectus.

17          So, anyway, the -- you know -- and

18     there are contested views of what Gustafson

19     means.  We always look at the language of a

20     statute.  You know, it's just one of the things

21     that we do.  And the language of Section 12 is

22     not the same in every relevant way.

23          MR. HUNGAR:  Well, that's certainly

24     true, but there are multiple clues as to why

25     Section 12 should be interpreted the way we
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1   suggest.

2   Number one, Congress said "such

3   security," not "any security," which is

4   obviously broader language like -- and it uses

5   that same language in Section 17, which everyone

6   acknowledges does apply to exempt transactions,

7   as well as registered -- registered shares.

8   The -- the -- the -- the logic of --

9   of Gustafson can't be reconciled with the

10   position you're suggesting because Gustafson

11   says that the -- that the liability imposed by

12   Section 12 is co-extensive with the obligation

13   to distribute a prospectus, which, by -- by

14   virtue of Section (5)(b)(2), is coextensive with

15   registered shares.

16   Section (5)(b)(2) says that it's

17   unlawful to disseminate shares in interstate

18   commerce unless such security is accompanied by

19   a prospectus, and "such security" there

20   necessarily refers only to registered shares.

21   My friends on the other side agree with that.

22   "Such security" in Section 12 should

23   be given the same meaning as a matter of -- of

24   normal statutory construction as the same term

25   used in the -- in the provision that it's

 1   enforcing.

 2   And, again --

 3   JUSTICE KAVANAUGH: Do we know what

 4   the SEC thinks about your Section 12 argument?

 5   Not that we would necessarily defer to it, but

 6   it's usually informative.

 7   MR. HUNGAR: I don't know that they

 8   have specifically taken a position on that

 9   question. Obviously, they have taken quite

10   affirmatively and repeatedly a position on the

11   Section 11 question, including in this Court in

12   the Herman & MacLean case, where they told this

13   Court explicitly that Section 11 provides a

14   cause of action only for purchasers of

15   registered shares. We cited that brief in our

16   -- in our opening brief.

17   JUSTICE GORSUCH: Mr. Hungar --

18   MR. HUNGAR: And they -- they chose

19   not to participate in this case, obviously

20   concluding that the prior position they had

21   taken before this Court was -- was sufficient.

22   JUSTICE GORSUCH: Mr. Hungar, would --

23   I guess another way of asking the question my

24   colleagues are getting at is, would the sky fall

25   should we answer the Section 11 question in your

 1   client's favor, vacate and remand, without

 2   addressing the Section 12 question?

 3   MR. HUNGAR: Well, certainly, it would

 4   fall in this case because the court of appeals

 5   answered that question and it answered it

 6   wrongly, and --

 7   JUSTICE GORSUCH: And we're going to

 8   vacate its judgment in light of your

 9   arguments -- supposing we were, in light of your

10   arguments on Section 11, and maybe it should

11   reconsider its Section 12 ruling in light of

12   that.

13   JUSTICE KAVANAUGH: And just to add to

14   that, the reason they did reach the conclusion

15   on 12, I believe, is because they thought 11 and

16   12 should be read together, which all three --

17   MR. HUNGAR: Yes.

18   JUSTICE KAVANAUGH: -- judges did, two

19   against you and one in your favor, but if they

20   know -- the Ninth Circuit knows that you're

21   actually prevailing on Section 11, who knows

22   what they'd do on Section 12.

23   MR. HUNGAR: Yes, certainly, that

24   would be better than where we stand right now.

25   Obviously, we think --

         1   JUSTICE GORSUCH: I would have

         2   thought.

         3   (Laughter.)

         4   MR. HUNGAR: We -- we obviously think

         5   that in light of the Court's decision in

         6   Gustafson, it -- it necessarily follows. I

         7   mean, again --

         8   JUSTICE GORSUCH: I know we've got

         9   the -- I've got --

        10   MR. HUNGAR: Yeah.

        11   JUSTICE GORSUCH: -- Gustafson, even

        12   if I can't pronounce it correctly.

        13   (Laughter.)

        14   JUSTICE GORSUCH: But -- but that --

        15   that would be an available course to the Court

        16   in your mind?

        17   MR. HUNGAR: Yes. I mean, there

        18   are -- there are further textual reasons, even

        19   putting Gustafson aside, why our interpretation

        20   of Section 12 is correct. I mentioned the "any"

        21   versus "such," which, you know, a textual

        22   distinction. This Court normally gives meaning

        23   to those distinctions.

        24   It's also true in Section 3 of the Act

        25   Congress referred to classes of securities.

1   Respondent's interpretation of "such security"

2   would essentially rewrite it to mean the whole

3   class, and yet Section 3 of the Act makes clear

4   that when Congress intended to refer to classes

5   of securities, it said so. And it didn't say so

6   in Section 12. It said "such security," which,

7   again, refers -- is -- should be given a

8   parallel construction to Section 5.

9   JUSTICE JACKSON: But can you help me

10   to understand, though, going back to Justice

11   Kagan's point, all of the differences that we

12   see between 12 and 11?

13   I mean, you're pointing to two areas

14   that you think are similar, but it seems as

15   though liability arises from the offering or

16   selling of a security by means of oral

17   communication, which doesn't have anything to

18   do, I guess, at least on its face, with a

19   prospectus. And so why would you have to have a

20   registered share in order to give rise to that

21   kind of liability?

22   MR. HUNGAR: Well, this Court said in

23   Gustafson that -- that oral communication has

24   been construed to be -- given its -- that it

25   appears together with the prospectus and in a --

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1       in a statute where the -- the structure makes

2       clear that -- that, you know, what a prospectus

3       is and when it's obligated to be distributed,

4       that oral statement has to be understood as a

5       reference to the prospectus, that something

6       along the lines of the prospectus, referring to

7       the contents of the prospectus, at the same time

8       --

9               JUSTICE JACKSON:  All right.  So even

10      in a situation where you have a prospectus, my

11      understanding was that a prospectus is a part of

12      a registration statement, but I suppose it could

13      also be separate.  Am I right about that?  Like,

14      it's a separate document.

15              MR. HUNGAR:  It's a separate document

16      that is -- that is physically part of -- so the

17      -- the registration statement contains a

18      prospectus that doesn't have all the final

19      information.  The final prospectus is filed

20      separately, but it's incorporated as part of the

21      registration statement.  So, yes, it's part of

22      the registration statement, but you could hand

23      someone a prospectus that doesn't have the full

24      registration statement.

25              JUSTICE JACKSON:  And in that
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1   situation where you hand someone a prospectus

2   and the prospectus has misleading or at least

3   arguably misleading information, your view is

4   that unless they did so in connection with a

5   registered share, there's no liability?

6   MR. HUNGAR: Yes, because that's what

7   Gustafson holds. Gustafson says "by means of"

8   means --

9   JUSTICE JACKSON: No, I understand.

10   MR. HUNGAR: Okay.

11   JUSTICE JACKSON: But what do we do

12   with the language in the statute, Section 12,

13   that suggests that there is liability with

14   respect to at least some exempt shares? I guess

15   I can't -- if you were right that registration

16   was sort of the core requirement of liability

17   under 12(a), how do we have a 12(a) that applies

18   on its face to some exemptions?

19   MR. HUNGAR: Well, because -- because

20   that's what Congress said. Congress specified

21   the exempt shares to which Section 12 would

22   apply. The reason it did that is because,

23   otherwise, exempt shares or exempt transactions

24   --

25   JUSTICE JACKSON: But, if you were

1   right -- if you were right about your thesis, if

2   you were right that 12(a) really is all about

3   registered shares, then we wouldn't see an

4   exemption. I appreciate that Congress put it in

5   here, but I think that undermines your argument

6   about what 12(a) is actually doing.

7   MR. HUNGAR: No, Your Honor, because,

8   without that parenthetical that brings Section 3

9   exemptions back into the scope of liability, all

10   the Section 3 classes of shares would be exempt

11   from Section 12 liability. But Congress wanted

12   Section 3 classes -- because, you understand,

13   Section 3 exempts an entire class like bank

14   securities or savings-and-loan securities. They

15   are not subject to the registration requirement,

16   to the Section 11 liability requirements. But

17   Congress -- because those are often issued in

18   public offerings, just like nonexempt shares,

19   Congress wanted those public offerings of

20   otherwise exempt shares to be covered by --

21   JUSTICE JACKSON: Is it direct lists

22   --

23   JUSTICE BARRETT: But is it like --

24   JUSTICE JACKSON: Go ahead.

25   JUSTICE BARRETT: I -- I was just

          1   going to ask you, I mean, the QP said whether

          2   plaintiffs must plead and prove that they bought

          3   registered shares -- sorry -- we're -- we're

          4   asking whether 12(a)(2) can only apply when

          5   there are registered shares. You're taking the

          6   position yes. But, by the same token, as this

          7   interchange with Justice Jackson is showing,

          8   12(a)(2) can apply sometimes to shares that are

          9   exempt from registration, right?

         10   MR. HUNGAR: Yes, actually, three

         11   classes.

         12   JUSTICE BARRETT: So why isn't that --

         13   if we decided it very narrowly to avoid some of

         14   the problems Justice Kavanaugh is flagging,

         15   couldn't we just say no, the answer to that is

         16   no because it applies, as Justice Jackson was

         17   saying, on its face to some shares that are

         18   exempt from registration? So, no, we don't have

         19   to decide the limits?

         20   MR. HUNGAR: But this isn't a Section

         21   3 case. The -- this is not a case involving a

         22   Section 3 exempt class.

         23   JUSTICE BARRETT: So you would just

         24   read that exemption very narrowly, is kind of

         25   your answer to Justice Jackson? I'm sorry.

 1   Read that language about Section 3 in saying

 2   which nonexempt shares are out of 12 -- you just

 3   read it very narrowly?

 4   MR. HUNGAR: I would read it according

 5   to the text. Congress said Section 12 imposes

 6   liability, which this Court said is -- is,

 7   generally speaking, contemporaneous with the

 8   prospectus requirement, except there's an

 9   exception. Congress made an exception to that

10   limited scope. The exception is, oh, but we're

11   bringing back into this the classes that are

12   exempted by Section 3.

13   So, in addition to most securities

14   where the rule is only -- only if there's a

15   prospectus obligation and, therefore, only if

16   there's a registered share can you have Section

17   12 liability, in this limited category of cases,

18   namely, Section 3 exempt classes, you can also

19   have Section 12 liability even though there's no

20   prospectus obligation.

21   But that has nothing to do with this

22   case because this case is not a Section 3 exempt

23   class; it's a Section 4 exempt transactions

24   case. And -- and -- Congress did not say, oh,

25   and we also want Section 4 exempt transactions

1   to be covered by Section 12. And that makes

2   perfect sense because Section 4 exempt

3   transactions, by definition, are not public

4   offerings. That's why they're exempt under

5   Section 4. That's what the Gustafson Court said

6   in explaining why Section 12 -- putting aside

7   the Section 3 exception, Section 12 is limited

8   to -- to public offerings, that is, non- -- non-

9   -- offerings that are not exempted by Section 4.

10   JUSTICE KAVANAUGH: Can I ask you a

11   question about Section 11? The former SEC

12   officials' amicus brief suggests that they

13   expected that in a direct listing, the

14   registration statement would cover all the

15   securities, all the shares, and they say that

16   your position would essentially transform the

17   '33 Act into an opt-out regime for direct

18   listings and that we shouldn't do that, and that

19   was contrary to the SEC's expectation when they

20   tackled this issue.

21   Do you just want to respond to that?

22   MR. HUNGAR: Yes, Your Honor. That's

23   clearly wrong for multiple reasons. In the

24   first place, the SEC approved the registration

25   in this state -- in this case and, indeed,

1   allowed it to take effect -- effect in advance

2   of the normal time frame after reviewing it.

3   The registration makes very clear at page 235 of

4   the Ninth Circuit excerpted record that in

5   addition to the 118 million registered shares

6   being made available, there are already 165

7   million exempt shares free to trade under the

8   SEC's own rule that -- that -- that addresses

9   the Section 4 exemption.

10   So it's perfectly clear the SEC knew

11   there would be additional exempt shares that

12   weren't being registered that could -- could --

13   that would trade and already were free to trade

14   even before the direct listing.

15   Beyond that, the SEC in 2020, in the

16   -- in the order that's discussed in the briefs,

17   where it approved the most recent version of the

18   NYSE direct listing rule, a commentator raised

19   concerns about Section 11 liability in the

20   direct listing context. They said, gee, it's

21   really hard to prove Section 11 liability in the

22   direct listing context because it's hard to

23   trace.

24   And the SEC acknowledged that, said,

25   well, yes, that's true, but there are lots of

 1   circumstances in which tracing is different in

 2   the modern securities market, and that's not a

 3   reason not to approve the rule change.

 4   JUSTICE KAVANAUGH: Could the SEC fix

 5   this, or could only Congress fix this? So I

 6   know the word "fix" is loaded, but you know what

 7   I mean, change this.

 8   MR. HUNGAR: Yes, the SEC could fix

 9   this, and if I may, I'd like to finish my answer

10   to the previous question --

11   JUSTICE KAVANAUGH: Sure.

12   MR. HUNGAR: -- because this is --

13   this is important. This conclusively

14   demonstrates that the -- that the argument on

15   the other side that direct listings were

16   supposed to require exempt shares to be

17   registered is just wrong. It would have made no

18   sense for the SEC to be talking about the

19   difficulty of tracing in the direct listing

20   context if the SEC thought that exempt shares

21   had to be registered in a direct listing. There

22   would be no tracing problem if direct shares had

23   to be registered in a direct listing. So,

24   obviously, the SEC knew and understood and

25   expected that exempt shares would not be

 1   registered in a direct listing.

 2   The SEC and the -- and the amicus

 3   brief by Chairman Clayton of the SEC, who was

 4   the chairman at the time that that rule -- that

 5   that order was issued, and Professor Grundfest

 6   identifies a number of things the SEC could do

 7   to address this if they thought it was a

 8   problem. They have chosen not to do any of

 9   those things to date. They have the power to do

10   it.

11   And the law and business professors'

12   brief also suggests that a recent regulatory

13   change after this case, the creation of the

14   consolidated audit trail, may facilitate tracing

15   in the future. That remains to be litigated.

16   But, again, the SEC has ample authority to

17   address this if they think it's a problem.

18   CHIEF JUSTICE ROBERTS: Thank -- thank

19   you, Mr. Hungar. You indicated that the reason

20   the SEC wasn't here, because they obviously

21   adhered to the prior position that they had

22   expressed. Do you have any evidence for that?

23   MR. HUNGAR: No, Your Honor, but I --

24   we think that's a reasonable inference since, if

25   they -- if they had wanted this Court to be

1   aware that they had a different position, I

2   would think they would have told the Court.

3   CHIEF JUSTICE ROBERTS: Justice

4   Thomas?

5   JUSTICE THOMAS: One small question.

6   How would you go about proving which shares are

7   registered in a trade like this?

8   MR. HUNGAR: Well, in a -- in a case

9   like this, you would need --

10   JUSTICE THOMAS: Or a listing. I'm

11   sorry.

12   MR. HUNGAR: -- you would need to be

13   able to trace the shares to the seller because

14   the -- the identity of the seller and the -- and

15   the basis for their sale determines whether they

16   were registered or exempt. That is, if -- if

17   the -- if a seller was a controlling shareholder

18   who could only sell registered shares and --

19   and, therefore, they were -- they were selling

20   the shares that were registered under the

21   registration statement, that would satisfy.

22   Now, again, it's very difficult. We

23   -- we don't think that it can be done in this

24   case. There's another pending state case where

25   plaintiffs claim they can prove it, and that's

1   being litigated. But the fact that it's

2   difficult doesn't justify reinterpreting the

3   statute, particularly since the difficulties

4   arose decades after the statute was enacted in

5   the 1960s.

6   JUSTICE THOMAS: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice Alito?

8   Justice Sotomayor?

9   JUSTICE SOTOMAYOR: You're asking us

10   on Section 11 to reverse the judgment below.

11   But Respondent is asking us to vacate and remand

12   so that they can have an opportunity to prove

13   tracing.

14   You're basically arguing, I think,

15   that they waived that. Isn't waiver always an

16   issue that we let the court below decide?

17   MR. HUNGAR: I don't know that you

18   always let -- I mean, it's a question of

19   forfeiture here not only in the courts below but

20   also in this Court. They didn't raise in their

21   brief in opposition any claim that, oh, by the

22   way --

23   JUSTICE SOTOMAYOR: Well, I think they

24   do when they say vacate and remand and let us do

25   it.

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1           MR. HUNGAR:  But -- but, Your Honor,
2    normally, this Court doesn't reach issues and --
3    or take account of issues that were forfeited
4    even in this Court.  Again, we said in our
5    petition --
6           JUSTICE SOTOMAYOR:  But it wasn't
7    forfeited --
8           MR. HUNGAR:  They're --
9           JUSTICE SOTOMAYOR:  -- in this Court.
10   They said give us a chance to prove we can.
11          MR. HUNGAR:  Under Rule 15, Your
12   Honor, they forfeited it by not saying in their
13   brief in opposition.
14          JUSTICE SOTOMAYOR:  I'm not going to
15   fight any longer with you on that.
16          I was intrigued by some amici
17   suggesting that we adopt a burden-shifting
18   framework.  As I understand that -- what's
19   happening here is that these direct listing
20   mechanisms are being -- are being touted and
21   advanced in order to avoid having any tracing of
22   direct listings of -- of public offerings.
23          And so, if we were concerned about
24   that, it did seem to me that the burden-shifting
25   idea made some sense.  You are purposely
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1   avoiding a public offering to avoid having to

2   sell only registered stock during a locked-up

3   period, and so you're evading all Section 11

4   liability, even though you are registering, as

5   the SEC requires, you're -- you're issuing a

6   registration statement before you can issue any

7   stock whatsoever.

8   So I guess my question to you is,

9   shouldn't we be leaving open that question on

10   the burden shifting, and why shouldn't we?

11   MR. HUNGAR: So several responses.

12   The burden-shifting argument is one of the many

13   issues that wasn't raised in the brief in

14   opposition or below and shouldn't be addressed

15   by the Court.

16   Number two, burden-shifting --

17   JUSTICE SOTOMAYOR: I'll accept that,

18   but should we leave it open?

19   MR. HUNGAR: Well, I mean, I don't

20   think the Court should address it at all because

21   it's not presented in the case, but -- but, if

22   the Court were to say something about it,

23   there's no basis at all for burden-shifting in

24   this statute.

25   JUSTICE SOTOMAYOR: Well, there's no

 1   basis in the statute for tracing either --

 2   MR. HUNGAR: But the statute --

 3   JUSTICE SOTOMAYOR: -- which hews

 4   judicially in construction -- from --

 5   MR. HUNGAR: Well, again, as I said,

 6   Section 12(a)(1) shows that Congress necessarily

 7   mandated tracing, but, beyond that, the -- the

 8   statute in -- in Sections 11 and 12, Congress

 9   very carefully addressed the question of

10   burdens.

11   It specifically assigned certain

12   burdens that would normally have been on the

13   plaintiff to the defendant in both of those

14   provisions, such as the burden of proving a lack

15   of negligence or due diligence.

16   And so Congress has spoken very

17   specifically to the question of burden

18   allocations. And this Court should not

19   essentially redo Congress's work for it and

20   decide that additional burdens should be placed

21   on the plaintiffs.

22   CHIEF JUSTICE ROBERTS: Justice Kagan?

23   JUSTICE KAGAN: Mr. Hungar, I just

24   wanted to go back to the Section 11, Section 12

25   distinction and give you a chance again to tell

 1   me why I might be wrong about the textual

 2   differences between the two sections.

 3   And, again, I want to just put

 4   Gustafson off the stage because I think we might

 5   just have a difference as to how far it went and

 6   what it said.

 7   So I count four key differences

 8   between the two sections. First, there's no

 9   reference in Section 12 to registration; second,

10   Section 12 clearly covers some unregistered

11   shares because it ropes in Section 3 securities;

12   third, Section 12 refers to sales not only by

13   means of a prospectus but also by means of oral

14   communication, which would suggest that we're

15   outside the world of registration; and, fourth,

16   Section 12 creates liabilities for sellers who

17   had absolutely nothing to do with the

18   registration statement, so the class of people

19   who -- who might be liable is very different and

20   is not connected to the registration statement.

21   And what that suggests to me is that

22   the two provisions are targeting two very

23   different things, that one is targeting

24   dishonesty in creating a registration statement

25   and the other is targeting dishonesty in certain

 1   kinds of sales, period, with or without a

 2   registration statement.

 3   So why am I wrong?

 4   MR. HUNGAR: So Section 12 does refer

 5   to -- to the registration requirement not in so

 6   many words, but, by definition, when you're

 7   talking about a prospectus, a prospectus is

 8   directly tied to the registration statement

 9   requirement.

10   Section 5 -- Section 5(b)(2) of the

11   Act specifically says that the obligation to

12   distribute a prospectus arises only with respect

13   to --

14   JUSTICE KAGAN: I think that was my

15   number three. It says prospectus or oral

16   communications. So we're clearly dealing in a

17   world here in which it might be a prospectus or

18   it might be something else.

19   MR. HUNGAR: Well, I'm trying to take

20   them one at a time, Your Honor.

21   The -- the argument that Section 12

22   doesn't refer to a prospectus -- to a -- to the

23   registration requirement is incorrect because

24   liability is predicated at least with respect to

25   the first part of the liability provision on the

 1   prospectus requirement.

 2   And, again, the prospectus requirement

 3   is limited to and applies only with respect to a

 4   security -- to any security with respect to

 5   which a registration statement has been filed.

 6   That is the definition -- "such

 7   security" in Section 5(b) refers back to any

 8   security with respect to which a registration

 9   statement has been filed. And -- and -- and

10   such security is the only security as to which

11   there's an obligation to distribute a

12   prospectus.

13   And this Court said in Gustafson

14   that's what prospectus means in Section 12. It

15   means the prospectus that's referred to in

16   Section 5(b), which is to say any -- the

17   prospectus that has to be distributed for any

18   security with respect to a registration

19   statement has been filed.

20   So there is a clear and unambiguous

21   direct link between the prospectus in Section 12

22   and the registration statement in Section 5.

23   And only registered securities are subject to

24   that requirement. This Court said that in so

25   many words in Gustafson.

1   So, with respect to oral

2   communication, again, what this Court said in

3   Gustafson, what the courts of appeals have said

4   under noscitur a sociis or whatever that canon

5   of construction is, that oral communication

6   can't mean every oral communication because,

7   given the prospectus is limited to the

8   prospectus -- referenced in Section 5 and

9   applies only to registered shares, it would

10   dramatically expand the -- the scope of

11   liability in a bizarre way if the -- the only

12   misrepresentations in a written -- in a writing

13   that were actionable were in the -- in the

14   prospectus applicable only to the registered

15   shares, but then, like, oral communications

16   opened the door to all sorts of suits based on

17   oral communications.

18   So this Court in Gustafson indicated

19   and the courts of appeals have consistently held

20   "oral communication" means an oral communication

21   relating to the prospectus, not some un-moored

22   type of oral communication. So, again, if it

23   has to relate to the prospectus, that means it's

24   tied to the registration requirement.

25   You asked about -- you -- you made a

1   Section 3 point. All I can say, as I've said

2   before, when Congress creates a liability

3   provision that on its face would not apply

4   because -- to exemptions because they're

5   exemptions and then it says, oh, but this

6   particular category of exemptions we want to

7   bring back in to the scope of liability, it is

8   reasonable to infer that they didn't bring in

9   the other category of exemptions, the Section 4

10   exemptions, that they didn't include in that

11   parenthetical as -- as securities that are going

12   to be covered by Section 12, even though they're

13   normally exempt.

14   And so the inclusion of one category

15   of exemptions and the exclusion of another

16   category of exemptions strongly supports the

17   conclusion that the second category of

18   exemptions remains exempt.

19   You had one other point.

20   CHIEF JUSTICE ROBERTS: Justice

21   Gorsuch?

22   Justice Kavanaugh?

23   Justice Barrett?

24   Justice Jackson?

25   JUSTICE JACKSON: Can I just ask you

 1   quickly, I've heard you say a couple of times

 2   that there's an obligation to distribute a

 3   prospectus or register, and I assume you mean a

 4   legal obligation. And your brief does focus

 5   heavily on that requirement, but I guess I'm

 6   wondering about voluntary registration.

 7   So can a company voluntarily register

 8   exempt shares?

 9   MR. HUNGAR: I mean, I suppose so.

10   Well, again, the exemption -- the Section 4

11   exemptions are transactional. So you could have

12   a share that is exempt in the hands of its

13   holder, that is, they would be legally entitled

14   to sell it, but they might choose to -- to have

15   it registered and ask the company to register it

16   along with, say, a registered offering of other

17   shares.

18   JUSTICE JACKSON: And isn't that

19   what's happening in the direct listing context

20   to some degree?

21   MR. HUNGAR: No, Your Honor.

22   JUSTICE JACKSON: No? Why?

23   MR. HUNGAR: Because they're not

24   registered. They're not -- and the shareholders

25   aren't asking -- I mean -- well, sorry. To be

1   clear, some shareholders did register their

2   shares. Those are registered shares. They had

3   to register those shares in order to sell them

4   because they were subject to restrictions.

5   Other shareholders --

6   JUSTICE JACKSON: But they started off

7   being exempt. I thought the direct listing, the

8   whole pool started off being exempt, and then we

9   had registration as part of it, and some of

10   those shares were designated as being registered

11   as part of the direct listing.

12   MR. HUNGAR: Not quite, Your Honor.

13   JUSTICE JACKSON: Okay.

14   MR. HUNGAR: Again -- and it's

15   confusing because the Section 4 exemptions are

16   transactional. So there were share -- before

17   the direct listing, there were certain large

18   shareholders or off -- affiliates of the

19   corporation who owned shares, they had obtained

20   those shares from the corporation in an exempt

21   offering -- I mean an exempt transaction for

22   that transfer from the corporation to that

23   initial category of, you know, officers,

24   directors, major shareholders.

25   JUSTICE JACKSON: All right. So those

1   were exempt originally?

2   MR. HUNGAR: Well, but they weren't

3   exempt in the sense that there were restrictions

4   on their ability to sell them. Because they're

5   -- because they're in that category of officers,

6   directors, affiliates of the corporation, they

7   could not sell those shares publicly without

8   registering them.

9   JUSTICE JACKSON: Okay.

10   MR. HUNGAR: And, therefore, in the

11   direct listing, they registered those shares in

12   order to sell them. But other people who were

13   not affiliates, low-level employees, say, who

14   may have gotten a few shares as part of a

15   employee stock option program or something, they

16   are not subject to the same restrictions because

17   they're not affiliates of the company.

18   And under the SEC's rules determining

19   who is exempt and who isn't exempt, they were

20   entitled to sell their shares publicly even

21   before the direct listing, and they didn't --

22   JUSTICE JACKSON: Without registering

23   them?

24   MR. HUNGAR: Correct, without

25   registering.

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 1              JUSTICE JACKSON:  Okay.

 2              MR. HUNGAR:  And they remained

 3   entitled to do that after the direct listing.

 4              JUSTICE JACKSON:  So the ones who

 5   registered them, do you concede that Section 11

 6   liability attached at that point?

 7              MR. HUNGAR:  I mean, those are

 8   registered shares, and, therefore, Section 11

 9   applies to those shares, yes.

10              JUSTICE JACKSON:  Thank you.

11              CHIEF JUSTICE ROBERTS:  Thank you,

12   counsel.

13              MR. HUNGAR:  Thank you.

14              CHIEF JUSTICE ROBERTS:  Mr. Russell.

15           ORAL ARGUMENT OF KEVIN K. RUSSELL

16             ON BEHALF OF THE RESPONDENT

17              MR. RUSSELL:  Mr. Chief Justice, and

18   may it please the Court:

19              Everyone agrees that "such security"

20   in Section 11 refers in some ways to the

21   registration statement challenged as misleading.

22   The question here is the precise nature of that

23   relationship.

24              Petitioners say "such security" refers

25   exclusively to what they call registered shares.
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1   But the statute doesn't use that term or provide

2   a definition for it, and neither do Petitioners.

3   That might seem unnecessary because

4   one would think that a registered share is one

5   specified in the registration statement, but

6   registration statements do not specify

7   individual shares, as exemplified by the

8   examples of Petitioner Butterfield's shares that

9   we discuss in our brief.

10   Instead, what registration statements

11   do is they do not act at the individual -- at

12   the level of individual shares. Instead, they

13   act at the level of a public offering of

14   securities, not shares, that is, the planned

15   introduction of a group of fungible shares to

16   the market at a particular time.

17   The function of the registration

18   statement is to provide the market the

19   information it needs to value all of those

20   fungible shares in that public offering. And

21   the function of Section 11 is to provide

22   investors confidence that they can rely on the

23   integrity of that market price, even though some

24   of those shares could have been sold in some

25   other transaction without a registration

1   statement.

2   Accordingly, the better view is that

3   "such security" in Section 11 refers to all of

4   the shares in the public offering for which the

5   registration statement was a prerequisite.

6   Section 12 also uses the term "such

7   security," but unlike in Section 11, it has a

8   direct grammatical referent, the security sold

9   by means of a misleading prospectus.

10   By its terms, that provision applies

11   to a security, not a registered security. And

12   the prospectus here is exactly the kind of

13   document Gustafson held to be a prospectus

14   within the meaning of Section 12.

15   Congress expressly mentioned shares

16   exempt under Section 3 because it had to,

17   because Section 3 says Section 3 exempt shares

18   are not subject to any of the provisions of the

19   statute, including Section 12.

20   Section 4 does not operate in that

21   way. It exempts only from the specific

22   registration requirement. As a consequence,

23   there is no need for Congress to mention that.

24   I welcome the Court's questions.

25   JUSTICE THOMAS: Would you comment on

 1   the tracing requirement? Mr. Hungar said -- I

 2   believe he said it was always there. And I'd

 3   like to see your -- have -- hear your reaction

 4   to that.

 5   MR. RUSSELL: Sure. What he is

 6   referring to is a -- a series of cases, starting

 7   with Barnes, in which the Court said not that

 8   you have to share -- not that you have to show

 9   that you purchased a registered share, because

10   all the shares in -- in Barnes and all the cases

11   that followed were registered shares.

12   The question was, registered under

13   which registration statement? Were they

14   registered under the -- were they part of the

15   offering made possible by the allegedly

16   misleading registration statement, or had they

17   been issued previously, which is what happened

18   in Barnes, under a registration statement that

19   was not misleading?

20   Those courts do not address the

21   question here. They ask which registration,

22   which registration statement, which registered

23   offering, and sometimes they use that term.

24   They say you have to trace your shares to the

25   registered offering. None of them say you have

 1   to show that you purchased a registered share

 2   because it didn't matter in any of those cases.

 3   And, indeed, the only case that they

 4   cite to that even addresses this question of the

 5   distinction between exempt and registered shares

 6   is the Fifth Circuit's 2005 decision in Krim.

 7   That is not the kind of circuit consensus that

 8   Congress could have ratified.

 9   And, instead, the proper understanding

10   of those cases is they are addressing a

11   different question. And if anything, they are

12   consistent with our view that the focus of

13   Section 11 is on the registered offering,

14   because everybody who purchases in that offering

15   is going to have their shares valued based on

16   that registration statement, whether the share

17   could have been sold in another kind of

18   transaction or not without a registration

19   statement.

20   JUSTICE THOMAS: The -- and, finally,

21   should Sections 11 and 12 rise or fall together?

22   MR. RUSSELL: No, they definitely do

23   not. They have very different language. The

24   textual ambiguity that arises in Section 11

25   comes from the fact that "such security" doesn't

 1   have a grammatical referent. It does in Section

 2   12. And it unambiguously refers to "a

 3   security," not "a registered security."

 4   My friend's reliance on Gustafson is

 5   entirely misplaced. The Court wasn't

 6   considering anything like this question there.

 7   It was asking the relatively straightforward

 8   question of what is a prospectus. And it held

 9   that a prospectus is this formal kind of

10   document that get filed -- that gets filed with

11   a registration statement, not, you know,

12   provisions of a contract in a private -- in a

13   private transaction.

14   Of course, this is not a private

15   transaction. This is Slack's public -- initial

16   public offering. They issued billions of shares

17   to the public for the first time -- or they sold

18   billions of dollars' worth of shares to the

19   public for the first time here. It is a core

20   thing that the '33 Act is designed to regulate.

21   But they claim to have found a way to

22   get out of Section -- Section 11 liability not

23   only in this special context about direct

24   listings but even in the more typical and much

25   more consequential context of regular IPOs,

 1   because you cannot -- I don't think this Court

 2   can write a decision adopting their

 3   interpretation without opening the door to

 4   issuers allowing some exceptions to their lockup

 5   rules that would result in the immediate

 6   introduction of exempt shares at the same time

 7   as the IPO shares.

 8   JUSTICE KAGAN: What -- what is your

 9   understanding, Mr. Russell, of why that hasn't

10   happened before now? Because I would think, if

11   this is an unsettled question, somebody would

12   have tested exactly that. You -- you know, just

13   in a regular IPO, you also include some

14   unregistered shares. But we haven't seen that.

15   Why not?

16   MR. RUSSELL: You haven't seen that,

17   and -- and the important thing is we haven't

18   seen any cases saying you can do that either.

19   You know, Petitioners insist that this has been

20   settled for a long time, that they absolutely

21   have the right to -- to engage in this kind of

22   stratagem. But every time they say that, they

23   don't cite any cases. They --

24   JUSTICE KAGAN: I mean, do you know of

25   any issuers that have done that?

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1           MR. RUSSELL:  Certainly, I am aware
2      the SEC in that 2020 order notes in a footnote
3      that not every lockup period has -- you know,
4      that some lockup periods have exemptions.  I'm
5      not sure -- I'm not aware, to answer your
6      question, of anybody raising this argument in
7      the post-lockup period context.  I suppose --
8           JUSTICE KAGAN:  But you think that
9      there would be no distinction between the two in
10     terms of the law that's being argued about here?
11          MR. RUSSELL:  I don't see how you
12     could.  Their position is that as soon as exempt
13     shares enter the market, you have to trace and
14     show that the shares that you identified are
15     registered shares and not exempt shares.  And
16     that -- there's no difference between the
17     post-IPO lockup period and a direct listing in
18     that respect.
19          And they insist, and the Fifth Circuit
20     in Krim has held, that that's impossible to do,
21     that as soon as it enters the share, that
22     share's getting to legal, including in the share
23     depository and -- and -- and -- and in the
24     books, the -- the street listings and brokers,
25     and at the very least, even if it's not
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 1   completely impossible to conduct that kind of

 2   tracing, it is surely exceedingly burdensome

 3   and --

 4   JUSTICE KAVANAUGH: When -- keep

 5   going. Sorry.

 6   MR. RUSSELL: Exceedingly burdensome

 7   not only for the parties but also for the courts

 8   and the juries who are going to have to

 9   determine the registration status of perhaps

10   millions of individual shares of stocks and on

11   the third parties who will be subject to

12   discovery, the -- the brokers, the share

13   depositories, in order to engage in this -- this

14   exercise.

15   JUSTICE KAVANAUGH: One of the things

16   that's said on the other side and in the amicus

17   briefs, I think, is that you have a problem,

18   going the other direction from the status quo,

19   that in a typical IPO, the issuer's liability

20   ends with the end of the lockup period. But

21   your theory, if we were to accept it, in

22   Section 11 cases, would allow liability to go on

23   even after the lockup period?

24   MR. RUSSELL: So two things about

25   that. I think there are things that they can do

 1   to -- to cut the liability off, but they don't

 2   cite any cases for the proposition that they --

 3   they get to cut the liability off either. And

 4   they certainly don't cite any cases that --

 5   JUSTICE KAVANAUGH: But that would

 6   be -- just the premise, that would be a big

 7   change from the status quo --

 8   MR. RUSSELL: No.

 9   JUSTICE KAVANAUGH: -- in IPOs, right?

10   MR. RUSSELL: They have not

11   established that that is the general rule in

12   IPOs --

13   JUSTICE KAVANAUGH: Okay.

14   MR. RUSSELL: -- that you get to cut

15   off that liability in that way. It may be the

16   practice in some lower courts. It is not.

17   There's no circuit consensus about that, and,

18   certainly, this Court hasn't held.

19   But what they --

20   JUSTICE BARRETT: Do you see a lot of

21   suits that we're not seeing, kind of to Justice

22   Kavanaugh's point?

23   MR. RUSSELL: The -- the cases where

24   people are including the post-lockup IPOs --

25   JUSTICE BARRETT: Yeah.

1   MR. RUSSELL: -- shares in them?

2   JUSTICE BARRETT: Yeah.

3   MR. RUSSELL: I don't know. I mean,

4   nobody has cited this Court cases one way or the

5   other about that body of cases.

6   I will say what issuers --

7   JUSTICE BARRETT: Maybe --

8   MR. RUSSELL: -- can do --

9   JUSTICE BARRETT: -- it's because

10   people think they can't bring them. I mean, it

11   seems kind of -- to Justice Kavanaugh's point,

12   the status quo is that after the lockup period

13   ends, these suits don't go forward under Section

14   11.

15   MR. RUSSELL: But -- well, two things

16   about that. One thing, I think, even on our

17   view of the statute, that an issuer can do is

18   withdraw the registration statement at the end

19   of the lockup period. Slack did something

20   similar in this case. After 90 days, they

21   withdrew the registration statement. And so

22   that provides them that kind of protection.

23   The difference between that solution

24   and what they're proposing is that if you adopt

25   their view, they don't only cut off liability

1   after the end of the lockup period; they can,

2   simply by having a limited exception to the

3   lockup period on day one, eliminate all

4   liability altogether, including for all the

5   shares in the IPO, because as soon as they let a

6   single share, exempt share, onto the market,

7   which they can easily do, it doesn't harm their

8   interest of the underwriters because they don't

9   have to let enough in that's going to affect the

10   share price, as soon as they let in even a small

11   number of shares, we've got this intermingling

12   that they say requires tracing that they say is

13   impossible to do, and the Fifth Circuit has

14   agreed.

15   You know, they've been a little bit

16   careful about how hard they think tracing is in

17   this Court, but you can rest assured that if

18   this Court issues a decision in their favor,

19   they're going to be arguing to the lower courts

20   that you need to adopt the position in Krim, and

21   -- and then we'll be at the end of it. And

22   there are only --

23   JUSTICE SOTOMAYOR: So let me ask you,

24   if we find -- if we find tracing is required,

25   then we should do what they want, reverse,

 1   because you can't prove tracing?

 2   MR. RUSSELL: No. I -- I think you

 3   should leave it to the lower court. It is

 4   true -- you know, we pled in our complaint that

 5   the shares were traceable.

 6   But we did say during the briefing

 7   that if what that means is we have to show the

 8   exemption status of every share that my client

 9   purchased, we couldn't do that. And I think you

10   can just leave it up to the lower courts to say

11   whether that precludes us from being able to

12   take advantage of additional briefing --

13   JUSTICE SOTOMAYOR: Because I was

14   seeing the numbers. You could prove that a

15   certain percentage of your stock had to be

16   registered, correct?

17   MR. RUSSELL: I certainly think we can

18   meet the Iqbal and Twombly standard --

19   JUSTICE SOTOMAYOR: Right.

20   MR. RUSSELL: -- by showing that it is

21   not only plausible but virtually certain that my

22   client purchased some registered shares, and I

23   think that's all you have to do to establish

24   standing. Everything else is a damages

25   question. But --

 1   JUSTICE JACKSON: Can I ask about your

 2   Section 11 argument? Because I thought I

 3   understood you to say in your brief that "such

 4   securities" includes shares that the

 5   registration statement allows to be sold but not

 6   if the registration statement merely informs the

 7   share's valuation.

 8   Is that your position? And how do you

 9   draw that line, or where does it come from?

10   MR. RUSSELL: No, I -- I don't -- I'm

11   -- I apologize if we gave that impression.

12   JUSTICE JACKSON: Okay.

13   MR. RUSSELL: Our position is that,

14   look, Section 11 is agnostic to why you have a

15   registration statement.

16   JUSTICE JACKSON: Okay.

17   MR. RUSSELL: The point of Section 11

18   is, once there's a registration statement, all

19   the shares in the public -- in the public

20   offering that required that registration

21   statement in order to go forward are going to be

22   valued on the basis of that registration

23   statement.

24   And it is completely understandable

25   that Congress would have then said that

1   everybody who buys shares that are based on a

2   price that is inflated or deflated because of a

3   misstatement should have a remedy.

4   JUSTICE JACKSON: So does it matter --

5   my understanding in this particular case is that

6   the direct listing itself registered certain

7   shares or said that some subset of all the

8   shares that were going on the market would be

9   registered and others weren't.

10   So what do we do with that fact in

11   light of your argument?

12   MR. RUSSELL: I think that one of the

13   benefits of our argument is it gets away from

14   this question of having to look at a

15   registration statement and say which shares are

16   registered and which aren't.

17   In our view, so long as the shares

18   were part of a public offering for which a

19   registration statement was required, that

20   section only --

21   JUSTICE JACKSON: No, I understand

22   that, but -- but don't you have to -- don't you

23   have to persuade us that that's what Congress --

24   MR. RUSSELL: Yes.

25   JUSTICE JACKSON: -- intended with

 1   respect to Section 11?

 2   And so why is it that you can have a

 3   world in which the registration statement speaks

 4   to certain shares as registered and certain as

 5   not and, under your view, still implicate, all

 6   of them, implicate Section 11?

 7   MR. RUSSELL: So two responses to

 8   that. One is I think a premise of your question

 9   is that registration statements identify

10   specifically identifiable shares, and that's not

11   the case.

12   So, if you look at the Slack

13   registration statement here and look at the

14   shares of CEO Butterfield, they say he has 41

15   million shares and he's registering 11 million

16   of them.

17   There's no way you can tell from that

18   registration statement which are the 11 million

19   and which are the 30 million that aren't

20   registered. Yet they would have my client have

21   to prove, even though we know for sure, even if

22   he paid $40 directly to Mr. Butterfield and got

23   a share, he could not tell whether that share

24   was registered under this registration statement

25   or not, and that's because registration

 1   statements pave the way for public offerings.

 2   They do not register individual shares.

 3   JUSTICE GORSUCH: Counsel --

 4   CHIEF JUSTICE ROBERTS: Well, he

 5   can't -- the reason he can't is because the

 6   statute says "such security." I mean, that's

 7   the big hurdle for you to get over.

 8   I -- I don't think the -- unless your

 9   argument is, and I'm not dismissing it in any

10   sense, but it's simply a practicality argument,

11   you say that Congress must have intended

12   everybody to be able to sue and that we should

13   not be too punctilious about looking at "such"

14   in "such security."

15   MR. RUSSELL: No, we acknowledge "such

16   security" requires a relationship with the

17   registration statement. My point I was just

18   making is that they have this idea of what a

19   registered share is, which, in order to work,

20   requires registration statements to identify

21   specific individual shares, and they don't.

22   You know, if my client knew that he

23   had a particular share, if he got a paper

24   certificate, he could not look at the

25   registration statement and tell whether that's a

1 registered share or not because the registration

2 statement does not say which of

3 Mr. Butterfield's 40 million shares are

4 registered and which aren't, and that's a

5 problem.

6 The -- the -- the -- the broader point

7 about "such security," though, is that, you

8 know, their premise is that Section 11 is

9 enforcing the obligations of Section 5 and 4,

10 and that's simply incorrect.

11 Section 4 and 5 describe the

12 obligations of share owners and describe the

13 conditions under which they can sell their

14 shares lawfully. Section 11 doesn't say

15 anything about lawful shares and it doesn't say

16 anything about the duties of sellers. It

17 instead addresses the obligations of people who

18 write registration statements and says to them

19 that you've got to be accurate.

20 And then the question simply becomes,

21 what is the scope of the remedy provided when

22 that doesn't happen? And we don't think that

23 you can just transport a set of distinctions

24 that were put into the statute to govern the

25 obligations of sellers and when they can sell to

 1   that context.

 2   It makes perfect sense that Congress

 3   would have understood that a registration

 4   statement speaks to all of the -- the valuation

 5   of all of the shares in the registering -- in

 6   the registered offering for which it would file,

 7   and it's going to injure everybody who purchases

 8   in that public offering.

 9   JUSTICE GORSUCH: You -- you spoke

10   a -- a few moments ago and in the briefs too a

11   bit about this traceability requirement or

12   Section 11 is a standing question, and I -- I

13   just want to clear that up because I -- I -- I

14   for one don't quite see it that way.

15   It seems to me like it's part of the

16   cause of action under Section 11, not -- it

17   doesn't go to the question of constitutional

18   injury and -- in fact.

19   And so, yes, all you'd need to do is

20   plead facts suggesting that you can trace

21   consistent with the -- the Twiqbal standard, as

22   my friends like to call it.

23   (Laughter.)

24   JUSTICE GORSUCH: And -- and then

25   you're off to the races and it really just

 1   becomes a matter of damages, as I think you also

 2   alluded to. Is -- is that right?

 3   MR. RUSSELL: That's right. I don't

 4   think anybody is saying that it's a matter of

 5   Article III standing. They use the phrase

 6   "statutory standing."

 7   JUSTICE GORSUCH: Statutory standing.

 8   MR. RUSSELL: But I don't know that's

 9   any different than, you know, part of a cause of

10   action.

11   JUSTICE GORSUCH: Cause of action.

12   MR. RUSSELL: The critical thing,

13   though, is that it is not part of the cause of

14   action that in order to get into the door and to

15   proceed with the case, you've got to be able to

16   show every --

17   JUSTICE GORSUCH: No, I --

18   MR. RUSSELL: -- the -- the

19   registration status of every share.

20   JUSTICE GORSUCH: -- I -- I understand

21   your position on that. But, if we were to rule

22   against you on what Section 11 means, it still

23   would enable you to plead, and we're only at the

24   12(b)(6) stage here, that there are traceable

25   shares --

1   MR. RUSSELL: Yes.

2   JUSTICE GORSUCH: -- and -- and

3   plausible facts suggesting some traceable

4   shares. That's all that would be required.

5   MR. RUSSELL: That is correct, and

6   that's why, you know, we think, if you adopt our

7   interpretation of Section 11, you should disavow

8   any suggestion that they are entitled to -- to

9   affirmance of their motion to dismiss at this

10   stage because we surely satisfied Twiqbal or

11   however you word it.

12   JUSTICE KAVANAUGH: Can't we leave

13   that to the court of appeals to decide whether

14   it was forfeited or not?

15   MR. RUSSELL: Certainly. So I'm

16   addressing, I think, two different questions.

17   JUSTICE KAVANAUGH: Yes.

18   MR. RUSSELL: There -- there is a

19   forfeiture argument, and I think you leave that

20   to the court of appeals.

21   JUSTICE KAVANAUGH: Yeah.

22   MR. RUSSELL: There is a separate

23   argument about why, you know, maybe you would

24   affirm because we can't -- because, under your

25   interpretation --

1   JUSTICE KAVANAUGH: Yes.

2   MR. RUSSELL: -- that requires

3   registration, we don't meet Iqbal and Twombly,

4   and I think you should reject that.

5   JUSTICE KAVANAUGH: More -- more

6   broadly, I think the suggestion on the other

7   side and, certainly, the amicus briefs is that

8   this is a new thing, direct listings, and to

9   take your position here, we would have to depart

10   on Section 11 from a lot of law, starting with

11   Judge Friendly, that's been around for a long

12   time.

13   And rather than doing that -- this is

14   their suggestion -- we should leave it to the

15   SEC and/or Congress rather than ourselves, kind

16   of departing from that longstanding body of law.

17   So that's kind of an institutional

18   argument of sorts that they're suggesting leave

19   it to the SEC, and I just want to make sure you

20   can respond to that.

21   MR. RUSSELL: Thank you. I appreciate

22   that.

23   We -- we strongly dispute the premise.

24   The body of law that they are describing does

25   not hold that plaintiffs have to show that every

1   share they purchased was registered or not.

2   The body of law that they are pointing

3   to simply says you have to show that you

4   purchased under the registered offering that was

5   governed by the registration statement that you

6   said was misleading as opposed to issued under

7   some registration statement a few years earlier

8   that could have been entirely accurate. None of

9   those cases decide the question presented here.

10   Sometimes they use language about

11   registered shares, but it doesn't matter. It

12   didn't matter in that case because they weren't

13   drawing a distinction between registered shares

14   and exempt shares that were issued as part of a

15   registered offering because it simply didn't

16   matter in that case.

17   If I could turn again to Section 12

18   for a moment, you know, I do think that the

19   plain language of the statute just directly

20   answers the questions here. This is not at all

21   surprising that Congress would say that if you

22   use a misleading prospectus to sell a security,

23   it doesn't matter whether you're using it to

24   sell a registered security or a -- an exempt

25   security. It causes the same harm.

1   And, of course, in a case where you

2   have an intermingling of exempt and what they

3   call registered securities, anybody who is

4   offering those securities for sale is going to

5   make use of that prospectus because they have no

6   way of knowing if they are offering and -- and

7   -- and advertising and marketing registered

8   shares or not, and in all likelihood, the people

9   are going to buy some of both.

10   But the harm that Section 11 or

11   Section 12, I apologize, is directed against

12   surely arises whenever that prospectus is used

13   to -- to market securities in that way.

14   And I don't understand any reason why

15   our -- my friends think that the parenthetical

16   that represent -- that references Section 3 was

17   necessary in order to make clear that exempt

18   shares are a security. Clearly, an exempt

19   security is a security.

20   JUSTICE KAVANAUGH: If you were to

21   lose on Section 11 -- I'm not saying you're

22   going to, but if you did -- the discussion we

23   had earlier about leaving then Section 12 to the

24   court of appeals -- because I think you raised

25   good arguments on Section 12. The other side

 1   raised good arguments about Gustafson. We don't

 2   have the SEC. We don't have a lot of case law.

 3   I'm, speaking only for myself, a bit concerned

 4   about saying too much on Section 12 without more

 5   confidence about what we're doing.

 6   MR. RUSSELL: You know, we are the

 7   Respondents. We didn't want you to take either

 8   question --

 9   (Laughter.)

10   MR. RUSSELL: -- you know, and we're

11   happy for you to leave the status quo the way it

12   is. I do think it is an entirely

13   straightforward textual question.

14   JUSTICE KAVANAUGH: Well --

15   MR. RUSSELL: And I do think,

16   if you're concerned about -- I apologize.

17   JUSTICE KAVANAUGH: -- the -- it --

18   it's not, but anyway, keep going.

19   MR. RUSSELL: All right. But I would

20   say that, you know, if you're concerned about

21   getting this right without the benefit of the

22   views of -- of the SEC, you should consider

23   DIG-ing the entire case, because I don't think,

24   you know, that the concerns that you have about

25   the -- the correctness of the parties'

 1   interpretations of Section 12, I think, arise

 2   with respect to Section 11 as well, because they

 3   are -- again, the entire premise of their

 4   argument is that the world is divided into

 5   exempt shares and registered shares and

 6   Section 11 applies and -- and exempt shares are

 7   exempt from essentially everything in the

 8   statute.

 9   Section 3 does do that. Section 3

10   identifies a body of shares that are exempt from

11   nearly everything except Section 12 in the

12   statute. Congress didn't do that for Section 4.

13   Section 4 simply, as I said before, addresses

14   the -- when certain shares can be sold and in

15   certain kinds of transactions. It is not an

16   overall status that it bestows on individual

17   shares and exempts them from everything in the

18   statute.

19   JUSTICE KAVANAUGH: It's odd that the

20   SEC is not here. Mr. Hungar -- given how they

21   come in in our other cases, Mr. Hungar suggests

22   the reasonable inference on Section 11 is that

23   they -- they've stated their position before.

24   But I just want you to give us your response to

25   that.

Official

1   MR. RUSSELL: Okay. I have no idea
2 why they're not here. I will -- but I can say
3 with great confidence that the position they
4 expressed before is not a position that directly
5 translates to this case. They are simply
6 doing -- they expressed the position that Barnes
7 adopted, which is that you have to trace your
8 shares that you purchased to the registered
9 offering that was governed by the misleading
10 registration statement, not to some other
11 offering that may have had a perfectly fine
12 registration statement.
13   JUSTICE SOTOMAYOR: I have read some
14 commentators suggesting that the SE -- the --
15 the SG is having trouble with this case and
16 doesn't know what to do.
17   MR. RUSSELL: I --
18   JUSTICE SOTOMAYOR: Do you have any
19 indication of that?
20   MR. RUSSELL: I -- I -- I'm sorry. I
21 just don't know. They haven't --
22   CHIEF JUSTICE ROBERTS: May not be the
23 only one.
24   (Laughter.)
25   MR. RUSSELL: I will say, you know,

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 1      there is this question of -- of, you know, can

 2      Congress or the SEC fix this?  Certainly, I

 3      think there would be something to fix because,

 4      again, the practical consequence of adopting

 5      Petitioners' position, I think, is inevitably

 6      going to open the door to this -- their

 7      strategem of letting in a few exempt shares,

 8      even in traditional IPOs, and arguing that,

 9      therefore, you have to trace.  And that's

10      generally going to be impossible.  And so --

11                JUSTICE SOTOMAYOR:  In Footnote 7 of

12      your brief, you acknowledged that there is an

13      argument that the NYSE rule requires that all

14      securities sold in a direct listing be covered

15      by the registration statement and presumably by

16      the prospectus as well.  But you acknowledge you

17      waived that argument.  Is --

18                MR. RUSSELL:  That's correct.  We did

19      not raise that --

20                JUSTICE SOTOMAYOR:  Why isn't that a

21      foundational question or a critical question

22      with respect to whether we impose a tracing

23      requirement on you in this direct listing

24      context?

25                MR. RUSSELL:  I do think it is a
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1   critical question because it'll mean that if you

2   were to issue a decision in Respondent's favor

3   in this case, it may not matter in the direct

4   listing context. And the only effect of the

5   decision then would be with respect to this much

6   more common, much more consequential, and

7   under-briefed issue about what happens after the

8   expiration of a lockup period in a traditional

9   IPO.

10   You know, it is unfortunate that we

11   did not raise this below and -- or before, and

12   we're not asking the Court to rule on it now.

13   We recognize that that would be unfair. But we

14   do want the Court to be aware of this question

15   and not to say anything in -- in its opinion --

16   JUSTICE SOTOMAYOR: Might -- might be

17   --

18   MR. RUSSELL: -- prejudging that.

19   JUSTICE SOTOMAYOR: -- a ground to

20   DIG, no?

21   MR. RUSSELL: I'm sorry?

22   JUSTICE SOTOMAYOR: Might be another

23   ground to DIG?

24   MR. RUSSELL: It might be. I -- I can

25   certainly understand why the -- the Court would

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 1      do that in your -- I'm in a poor position to

 2      suggest that you do that because we didn't raise

 3      this in the brief in opposition.  So we -- we do

 4      think at the very least, though, that the Court

 5      should leave that -- that open and that should

 6      be something that can get percolated, and that

 7      may end up resolving the actual question in the

 8      context of direct listings.

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

10      serious consequence of their position that

11      you're going to create a pathway for evasion of

12      Section 11 in the context of traditional IPOs.

13               Their response isn't that that's

14      wrong; it's that that's right and we've always

15      had that right.  That is wrong.  Their other

16      response is don't worry about it because there's

17      always Section 10(b).  You know, that, I think,

18      is an inadequate response, including because the

19      whole reason Congress enacted Section 11 was

20      because it thought the common law cause of

21      action for fraud that existed before the Great

22      Depression was inadequate.  It's not something

23      that Section 10 provides --

24               JUSTICE SOTOMAYOR:  Counsel, I think

25      you've answered my question.  I --
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         1   MR. RUSSELL: I apologize. But it --

         2   I'm sorry.

         3   CHIEF JUSTICE ROBERTS: Anything

         4   further?

         5   Justice Thomas?

         6   Justice Alito?

         7   JUSTICE KAGAN: I wanted to make sure,

         8   Mr. Russell, I understood your textual argument,

         9   because it does seem to me like you have a hard

        10   row to hoe here. Granted, "such security"

        11   doesn't have an antecedent, but why shouldn't we

        12   read it Mr. Hungar's way?

        13   MR. RUSSELL: Two reasons. One, Mr.

        14   Hungar's way requires you to be able to identify

        15   specific shares as registered by the

        16   registration statement. As the Butterfield

        17   example shows, you cannot do that. And --

        18   JUSTICE KAGAN: How -- how about when

        19   -- when -- when it talks about the registration

        20   statement becoming effective and then it

        21   switches over to Section 6 and it says a

        22   registration statement shall be deemed effective

        23   only as to the securities specified therein?

        24   Why aren't we talking about those securities?

        25   MR. RUSSELL: Because the word

 1   "security" there is not "share," and it is not

 2   referring to individual shares, including

 3   because registration statements don't specify

 4   individual shares.

 5   If you look at Section 7, which then

 6   lists what goes into the registration statement,

 7   it refers to Schedule A. Schedule A doesn't say

 8   that you have to identify specific shares. The

 9   closest it comes is in subparagraph 11, which

10   says you have to identify the amount of capital

11   stock, an aggregate question, not individual

12   shares. If you look at the extensive SEC

13   regulations about what goes into a registration

14   statement, it also doesn't require you to

15   identify individual shares. And as I said

16   before and as the Butterfield example shows,

17   this registration statement doesn't identify

18   individual shares.

19   But I will say, even if you thought

20   that it made sense to talk about registered

21   shares and you could identify them and you knew

22   what they were, it is nonetheless the case that

23   Section 11, I think, simply doesn't follow that

24   line of distinction. That's a line of

25   distinction about the lawfulness of sales. It

 1   is about the obligations of sellers. Section 11

 2   is about the obligations of people who write --

 3   who write registration statements. And it is

 4   not at all strange, when we know that every

 5   share in a registered offering is going to be

 6   valued or misvalued based on what's said in that

 7   registration statement -- it's not at all

 8   unusual to think that Congress would provide a

 9   remedy to everyone who is foreseeably injured.

10   JUSTICE KAGAN: Thank you.

11   CHIEF JUSTICE ROBERTS: Justice

12   Gorsuch?

13   Justice Kavanaugh?

14   Justice Barrett?

15   Justice Jackson?

16   Thank you, counsel.

17   MR. RUSSELL: Thank you.

18   CHIEF JUSTICE ROBERTS: Rebuttal,

19   Mr. Hungar.

20   REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

21   ON BEHALF OF THE PETITIONERS

22   MR. HUNGAR: Thank you, Your Honor.

23   Just a few brief points.

24   First, some factual corrections.

25   Slack did not withdraw its registration

 1   statement. It merely withdrew it with respect

 2   to unsold shares. So the registration statement

 3   remained in effect. And under Respondent's

 4   interpretation, there would be no end to the

 5   liability potential for -- for companies that

 6   issue registration statements for the full

 7   three-year period of the -- the statute of

 8   repose, which would dramatically change the

 9   consensus.

10   Mr. Butterfield, another affiliate to

11   the company, could not sell unregistered shares.

12   So, if they registered only some of their

13   shares, only those could be sold. That's

14   because it would be illegal to sell unregistered

15   shares because of the exemption that only

16   applies for affiliates only applies to the

17   shares that are -- or, rather, there is no

18   exemption for them to sell. They'd have to be

19   registered in order to sell. So the -- only the

20   registered shares, so there's no difficulty

21   determining whether he sold registered shares.

22   Barnes did involve exempt shares as

23   well as registered shares that were already in

24   the market. The case makes that clear.

25   Counsel says that there's no consensus

 1   on Section 11. That's simply incorrect. Every

 2   court of appeals that had -- had addressed the

 3   question, eight courts of appeals, said that

 4   what "such security" means in Section 11 is

 5   shares registered under the registration

 6   statement that's being challenged.

 7   And that means, as everyone has

 8   understood for the past many decades, that in

 9   the case of an IPO, once there are exempt shares

10   on the market, the plaintiff must trace in order

11   to bring a Section 11 claim. And as I said at

12   the beginning, Respondent does not cite a single

13   case to the contrary in the 90-year history of

14   the Act. So the idea that somehow the norm is

15   that people can bring suits in those

16   circumstances is patently incorrect.

17   The SEC has -- counsel suggests that

18   the SEC's position is not clear and does not

19   address the question at issue here. That's

20   simply incorrect. Here's what the SEC told this

21   Court in the Herman & MacLean case: A plaintiff

22   may seek relief under Section 11 only with

23   respect to securities covered by the

24   registration statement.

25   There's no doubt, and, in fact, the

1   Court -- the SEC actually went on to say, even

2   though there could be outstanding securities of

3   the same class, that there would still not be

4   liability even if people had relied on the

5   registration statement with respect to those

6   other shares. So the SEC's position is

7   perfectly clear.

8   Respondent says that this was a public

9   offering of the exempt shares. That's simply

10   not true. If you look at Gustafson, Gustafson

11   defines what a public offering is.

12   A public offering is -- an offering is

13   by -- by an issuer or a controlling shareholder.

14   That's what Gustafson says. And that's exactly

15   the point that Gustafson is making,

16   distinguishing -- distinguishing between the

17   public offerings that are covered by Section 12,

18   public sales, public offerings that require a

19   registration statement and that -- that are by

20   issuers, controlling shareholders, underwriters

21   and the like, as distinct from the exempt shares

22   that are not public offerings because they're

23   exempt under Section 4, which carves out that

24   different class of offering -- of offerings for

25   different treatment, including under Section 12.

1   If the Court has no further questions,

2   I thank the Court, and we ask that the judgment

3   be reversed.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel. Counsel.

6   The case is submitted.

7   (Whereupon, at 12:55 p.m., the case

8   was submitted.)

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