# **SUPREME COURT OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES
SLACK TECHNOLOGIES, LLC, FKA SLACK )
TECHNOLOGIES, INC., ET AL., )
Petitioners, )
V. ) No. 22-200
FIYYAZ PIRANI, )
Respondent. )

Pages: 1 through 81 Place: Washington, D.C. Date: April 17, 2023

# HERITAGE REPORTING CORPORATION

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 SLACK TECHNOLOGIES, LLC, FKA SLACK ) TECHNOLOGIES, INC., ET AL., ) 4 5 Petitioners, ) ) No. 22-200 6 v. 7 FIYYAZ PIRANI, ) Respondent. 8 ) 9 10 11 Washington, D.C. 12 Monday, April 17, 2023 13 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. KEVIN K. RUSSELL, ESQUIRE, Washington, D.C.; on behalf 21 22 of the Respondent. 23 24 25

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1 PROCEEDINGS 2 (11:44 a.m.) 3 CHIEF JUSTICE ROBERTS: Mr. Hungar. ORAL ARGUMENT OF THOMAS G. HUNGAR 4 ON BEHALF OF THE PETITIONERS 5 MR. HUNGAR: Thank you, Mr. Chief 6 7 Justice, and may it please the Court: Sections 11 and 12 of the '33 Act 8 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 2.2 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

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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
б	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?

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1 I mean, that seems to be what's causing the 2 problem. 3 MR. HUNGAR: We haven't had direct listing before, Your Honor, but, certainly, 4 there are other circumstances, and it's 5 6 undisputed that there are many other 7 circumstances, in which the tracing requirement, given the modern operation of the securities 8 markets, is difficult or sometimes impossible 9 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 mechanisms it could adopt to address that 13 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 intended and required there to be tracing and 21 2.2 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
б	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 obligation to register particular securities, 4 the shares that -- that have to be registered, 5 6 and requires a prospectus to be delivered only 7 in connection with particular securities, namely, registered securities. 8 JUSTICE JACKSON: But isn't -- isn't 9 12(a)(2) broader? I understood 12(a)(2) to also 10 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. Ιt 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 exempted by Section 3, which exempts particular 20 21 classes of securities from other obligations of 2.2 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

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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.

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1 JUSTICE SOTOMAYOR: Not all 2 unregistered, only certain transactions that are 3 unregistered. 4 MR. HUNGAR: Correct. JUSTICE SOTOMAYOR: So it seems to me 5 that the negative of Section 4 is, if it's not 6 7 mentioned, it's covered by 12. MR. HUNGAR: Well, this Court in 8 9 Gustafson expressly addressed that question and said exactly the opposite, that the -- the --10 11 the important distinction is that the -- what 12 the Court was saying in -- in Gustafson --JUSTICE SOTOMAYOR: No, no, but 13 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, Your Honor, it was. The Court in Gustafson said 19 20 that "by means of a prospectus" limits Section 21 12(2) to public offerings. That's at page 577. 2.2 And it said at page 571 liability under Section 12(2) cannot attach unless there is an 23 24 obligation to distribute the prospectus. The 25 obligation to distribute the prospectus is

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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. MR. HUNGAR: No, Your Honor. The --7 I'm not sure I understand your --8 JUSTICE GORSUCH: There are no 9 10 registration statements required to do direct 11 sales at all? 12 MR. HUNGAR: Well, I guess I'm not sure what you mean by "direct sales." So a 13 14 public offering, which -- which, by definition, 15 is an offering that's not exempt under Section 16 4, requires a registration. JUSTICE GORSUCH: I'm sorry, direct --17 18 I'm talking about direct listings, okay, rather than sales. 19 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

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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 --JUSTICE GORSUCH: But there is still a 4 requirement that you have a registration 5 statement before you do a direct listing? 6 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 the decision in Gustafson, which clarified the 20 21 scope of Section 12(a)(2) liability. And 2.2 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

12

1 distribute a prospectus with respect to Section 2 4 exempt transactions --3 JUSTICE KAVANAUGH: Can I --JUSTICE BARRETT: Could --4 MR. HUNGAR: -- which is what we're 5 6 talking about here. 7 JUSTICE ALITO: Were you required to issue a prospectus in order to do the direct 8 listing? 9 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. There's not a lot of law out there on 20 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 about the Section 12 issue. So I'll just --24 25 that's what I'm thinking.

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.

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
б	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 position's been out there for a long time. A 3 lot of cases. We don't really have that on --4 on Section 12. And I quess I'm just worried 5 about making a mistake on Section 12 one way or 6 7 another because we don't have the kind of thorough consideration we usually have before we 8 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 security" should be construed the same in both 13 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 equipped23 at this moment to chime in on.

24 MR. HUNGAR: I think the Court's25 decision in Gustafson answers these questions.

16

1 The -- the -- the fundamental logic --2 JUSTICE KAVANAUGH: I read it a lot, and I -- and I didn't come away with, like, this 3 is the clear answer to the Section 12 issue. 4 MR. HUNGAR: But -- but, Your Honor, 5 6 the -- the --7 JUSTICE KAVANAUGH: Maybe I -- maybe I 8 should have. 9 MR. HUNGAR: -- the fundamental logic of the Gustafson decision is that Section 12(2) 10 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 --MR. HUNGAR: -- which are exempt 18 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 not refer back to -- to registration in any way. 25

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

1 suggest. 2 Number one, Congress said "such security," not "any security," which is 3 obviously broader language like -- and it uses 4 that same language in Section 17, which everyone 5 acknowledges does apply to exempt transactions, 6 7 as well as registered -- registered shares. The -- the -- the -- the logic of --8 of Gustafson can't be reconciled with the 9 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 to distribute a prospectus, which, by -- by 13 virtue of Section (5)(b)(2), is coextensive with 14 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. My friends on the other side agree with that. 21 2.2 "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

19

1 enforcing. 2 And, again --3 JUSTICE KAVANAUGH: Do we know what the SEC thinks about your Section 12 argument? 4 Not that we would necessarily defer to it, but 5 6 it's usually informative. 7 MR. HUNGAR: I don't know that they have specifically taken a position on that 8 question. Obviously, they have taken quite 9 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 Court explicitly that Section 11 provides a 13 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 concluding that the prior position they had 20 21 taken before this Court was -- was sufficient. 2.2 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

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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 answered that question and it answered it 5 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 arguments on Section 11, and maybe it should 10 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 2.2 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 --

21

1 JUSTICE GORSUCH: I would have 2 thought. 3 (Laughter.) MR. HUNGAR: We -- we obviously think 4 that in light of the Court's decision in 5 Gustafson, it -- it necessarily follows. I 6 7 mean, again --8 JUSTICE GORSUCH: I know we've got the -- I've got --9 10 MR. HUNGAR: Yeah. 11 JUSTICE GORSUCH: -- Gustafson, even 12 if I can't pronounce it correctly. 13 (Laughter.) JUSTICE GORSUCH: But -- but that --14 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 of Section 12 is correct. I mentioned the "any" 20 21 versus "such," which, you know, a textual 2.2 distinction. This Court normally gives meaning to those distinctions. 23 It's also true in Section 3 of the Act 24 25 Congress referred to classes of securities.

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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 that when Congress intended to refer to classes 4 of securities, it said so. And it didn't say so 5 in Section 12. It said "such security," which, 6 7 again, refers -- is -- should be given a parallel construction to Section 5. 8 9 JUSTICE JACKSON: But can you help me to understand, though, going back to Justice 10 Kagan's point, all of the differences that we 11 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 registered share in order to give rise to that 20 21 kind of liability? 2.2 MR. HUNGAR: Well, this Court said in Gustafson that -- that oral communication has 23 been construed to be -- given its -- that it 24 25 appears together with the prospectus and in a --

in a statute where the -- the structure makes
clear that -- that, you know, what a prospectus
is and when it's obligated to be distributed,
that oral statement has to be understood as a
reference to the prospectus, that something
along the lines of the prospectus, referring to
the contents of the prospectus, at the same time
--

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 that is -- that is physically part of -- so the 16 17 -- the registration statement contains a prospectus that doesn't have all the final 18 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 2.2 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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situation where you hand someone a prospectus 1 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 registered share, there's no liability? 5 6 MR. HUNGAR: Yes, because that's what 7 Gustafson holds. Gustafson says "by means of" 8 means --JUSTICE JACKSON: No, I understand. 9 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 2.2 apply. The reason it did that is because, 23 otherwise, exempt shares or exempt transactions 24 25 JUSTICE JACKSON: But, if you were

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1 right -- if you were right about your thesis, if you were right that 12(a) really is all about registered shares, then we wouldn't see an exemption. I appreciate that Congress put it in here, but I think that undermines your argument about what 12(a) is actually doing.

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7 MR. HUNGAR: No, Your Honor, because, without that parenthetical that brings Section 3 8 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, Section 3 exempts an entire class like bank 13 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 2.2 23 JUSTICE BARRETT: But is it like --24 JUSTICE JACKSON: Go ahead. 25 JUSTICE BARRETT: I -- I was just

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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.

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Read that language about Section 3 in saying
 which nonexempt shares are out of 12 -- you just
 read it very narrowly?

MR. HUNGAR: I would read it according 4 to the text. Congress said Section 12 imposes 5 6 liability, which this Court said is -- is, 7 generally speaking, contemporaneous with the prospectus requirement, except there's an 8 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.

So, in addition to most securities 13 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.

But that has nothing to do with this case because this case is not a Section 3 exempt class; it's a Section 4 exempt transactions case. And -- and -- Congress did not say, oh, and we also want Section 4 exempt transactions

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1 to be covered by Section 12. And that makes perfect sense because Section 4 exempt 2 3 transactions, by definition, are not public offerings. That's why they're exempt under 4 Section 4. That's what the Gustafson Court said 5 in explaining why Section 12 -- putting aside 6 7 the Section 3 exception, Section 12 is limited to -- to public offerings, that is, non- -- non-8 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 expected that in a direct listing, the 13 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 tackled this issue. 20 21 Do you just want to respond to that? 2.2 MR. HUNGAR: Yes, Your Honor. That's clearly wrong for multiple reasons. 23 In the 24 first place, the SEC approved the registration 25 in this state -- in this case and, indeed,

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1 allowed it to take effect -- effect in advance 2 of the normal time frame after reviewing it. The registration makes very clear at page 235 of 3 the Ninth Circuit excerpted record that in 4 addition to the 118 million registered shares 5 6 being made available, there are already 165 7 million exempt shares free to trade under the SEC's own rule that -- that -- that addresses 8 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 -- in the order that's discussed in the briefs, 16 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 really hard to prove Section 11 liability in the 21 2.2 direct listing context because it's hard to 23 trace.

And the SEC acknowledged that, said, well, yes, that's true, but there are lots of

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1 circumstances in which tracing is different in 2 the modern securities market, and that's not a reason not to approve the rule change. 3 JUSTICE KAVANAUGH: Could the SEC fix 4 this, or could only Congress fix this? So I 5 know the word "fix" is loaded, but you know what 6 7 I mean, change this. MR. HUNGAR: Yes, the SEC could fix 8 9 this, and if I may, I'd like to finish my answer to the previous question --10 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 supposed to require exempt shares to be 16 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 had to be registered in a direct listing. 21 There 2.2 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.

The SEC and the -- and the amicus 2 3 brief by Chairman Clayton of the SEC, who was the chairman at the time that that rule -- that 4 that order was issued, and Professor Grundfest 5 identifies a number of things the SEC could do 6 7 to address this if they thought it was a problem. They have chosen not to do any of 8 those things to date. They have the power to do 9 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 the SEC wasn't here, because they obviously 20 21 adhered to the prior position that they had 2.2 expressed. Do you have any evidence for that? 23 MR. HUNGAR: No, Your Honor, but I -we think that's a reasonable inference since, if 24 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? JUSTICE THOMAS: One small question. 5 6 How would you go about proving which shares are 7 registered in a trade like this? MR. HUNGAR: Well, in a -- in a case 8 like this, you would need --9 JUSTICE THOMAS: Or a listing. 10 I'm 11 sorry. 12 MR. HUNGAR: -- you would need to be able to trace the shares to the seller because 13 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 registration statement, that would satisfy. 21 2.2 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 plaintiffs claim they can prove it, and that's 25

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? Justice Sotomayor? 8 9 JUSTICE SOTOMAYOR: You're asking us on Section 11 to reverse the judgment below. 10 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 also in this Court. They didn't raise in their 20 21 brief in opposition any claim that, oh, by the 22 way --JUSTICE SOTOMAYOR: Well, I think they 23 24 do when they say vacate and remand and let us do 25 it.

1 MR. HUNGAR: But -- but, Your Honor, 2 normally, this Court doesn't reach issues and -or take account of issues that were forfeited 3 even in this Court. Again, we said in our 4 petition --5 6 JUSTICE SOTOMAYOR: But it wasn't 7 forfeited --8 MR. HUNGAR: They're --JUSTICE SOTOMAYOR: -- in this Court. 9 They said give us a chance to prove we can. 10 11 MR. HUNGAR: Under Rule 15, Your 12 Honor, they forfeited it by not saying in their brief in opposition. 13 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 mechanisms are being -- are being touted and 20 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

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 liability, even though you are registering, as 4 the SEC requires, you're -- you're issuing a 5 registration statement before you can issue any 6 7 stock whatsoever. So I quess my question to you is, 8 9 shouldn't we be leaving open that question on the burden shifting, and why shouldn't we? 10 11 MR. HUNGAR: So several responses. 12 The burden-shifting argument is one of the many issues that wasn't raised in the brief in 13 opposition or below and shouldn't be addressed 14 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 think the Court should address it at all because 20 21 it's not presented in the case, but -- but, if 2.2 the Court were to say something about it, 23 there's no basis at all for burden-shifting in this statute. 24 25 JUSTICE SOTOMAYOR: Well, there's no

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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,
б	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

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1 me why I might be wrong about the textual differences between the two sections. 2 And, again, I want to just put 3 Gustafson off the stage because I think we might 4 just have a difference as to how far it went and 5 what it said. 6 7 So I count four key differences between the two sections. First, there's no 8 9 reference in Section 12 to registration; second, Section 12 clearly covers some unregistered 10 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 registration statement, so the class of people 18 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 2.2 the two provisions are targeting two very 23 different things, that one is targeting 24 dishonesty in creating a registration statement and the other is targeting dishonesty in certain 25

kinds of sales, period, with or without a 1 2 registration statement. 3 So why am I wrong? MR. HUNGAR: So Section 12 does refer 4 to -- to the registration requirement not in so 5 6 many words, but, by definition, when you're 7 talking about a prospectus, a prospectus is directly tied to the registration statement 8 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 them one at a time, Your Honor. 20 21 The -- the argument that Section 12 2.2 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

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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 under noscitur a sociis or whatever that canon 4 of construction is, that oral communication 5 can't mean every oral communication because, 6 7 given the prospectus is limited to the prospectus -- referenced in Section 5 and 8 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 "oral communication" means an oral communication 20 21 relating to the prospectus, not some un-moored 2.2 type of oral communication. So, again, if it 23 has to relate to the prospectus, that means it's tied to the registration requirement. 24

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 quess 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 holder, that is, they would be legally entitled 13 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. 2.2 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

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1 clear, some shareholders did register their 2 shares. Those are registered shares. They had to register those shares in order to sell them 3 because they were subject to restrictions. 4 Other shareholders --5 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 those shares were designated as being registered 10 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 shareholders or off -- affiliates of the 18 corporation who owned shares, they had obtained 19 20 those shares from the corporation in an exempt 21 offering -- I mean an exempt transaction for 2.2 that transfer from the corporation to that 23 initial category of, you know, officers, directors, major shareholders. 24 25 JUSTICE JACKSON: All right. So those

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1 were exempt originally? MR. HUNGAR: Well, but they weren't 2 3 exempt in the sense that there were restrictions on their ability to sell them. Because they're 4 -- because they're in that category of officers, 5 directors, affiliates of the corporation, they 6 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 not affiliates, low-level employees, say, who 13 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 entitled to sell their shares publicly even 20 before the direct listing, and they didn't --21 2.2 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
б	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
б	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

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1 statement. 2 Accordingly, the better view is that "such security" in Section 11 refers to all of 3 the shares in the public offering for which the 4 registration statement was a prerequisite. 5 Section 12 also uses the term "such 6 7 security," but unlike in Section 11, it has a direct grammatical referent, the security sold 8 by means of a misleading prospectus. 9 10 By its terms, that provision applies 11 to a security, not a registered security. And the prospectus here is exactly the kind of 12 13 document Gustafson held to be a prospectus within the meaning of Section 12. 14 15 Congress expressly mentioned shares 16 exempt under Section 3 because it had to, because Section 3 says Section 3 exempt shares 17 18 are not subject to any of the provisions of the 19 statute, including Section 12. 20 Section 4 does not operate in that It exempts only from the specific 21 way. 2.2 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?

Those courts do not address the question here. They ask which registration, which registration statement, which registered offering, and sometimes they use that term. They say you have to trace your shares to the registered offering. None of them say you have

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to show that you purchased a registered share 1 2 because it didn't matter in any of those cases. 3 And, indeed, the only case that they cite to that even addresses this question of the 4 distinction between exempt and registered shares 5 is the Fifth Circuit's 2005 decision in Krim. 6 7 That is not the kind of circuit consensus that Congress could have ratified. 8 9 And, instead, the proper understanding of those cases is they are addressing a 10 11 different question. And if anything, they are 12 consistent with our view that the focus of Section 11 is on the registered offering, 13 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, should Sections 11 and 12 rise or fall together? 21 2.2 MR. RUSSELL: No, they definitely do 23 not. They have very different language. The textual ambiguity that arises in Section 11 24 25 comes from the fact that "such security" doesn't

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1 have a grammatical referent. It does in Section 2 12. And it unambiguously refers to "a security," not "a registered security." 3 My friend's reliance on Gustafson is 4 entirely misplaced. The Court wasn't 5 6 considering anything like this question there. 7 It was asking the relatively straightforward question of what is a prospectus. And it held 8 9 that a prospectus is this formal kind of document that get filed -- that gets filed with 10 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 thing that the '33 Act is designed to regulate. 20 But they claim to have found a way to 21 2.2 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,

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1 because you cannot -- I don't think this Court 2 can write a decision adopting their 3 interpretation without opening the door to issuers allowing some exceptions to their lockup 4 rules that would result in the immediate 5 introduction of exempt shares at the same time 6 7 as the IPO shares. JUSTICE KAGAN: What -- what is your 8

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 settled for a long time, that they absolutely 20 21 have the right to -- to engage in this kind of 2.2 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?

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
б	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 --JUSTICE KAVANAUGH: When -- keep 4 5 qoing. 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 depositories, in order to engage in this -- this 13 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, going the other direction from the status quo, 18 19 that in a typical IPO, the issuer's liability ends with the end of the lockup period. But 20 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

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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 --JUSTICE KAVANAUGH: But that would 5 6 be -- just the premise, that would be a big 7 change from the status quo --MR. RUSSELL: No. 8 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 suits that we're not seeing, kind of to Justice 21 22 Kavanaugh's point? 23 MR. RUSSELL: The -- the cases where 24 people are including the post-lockup IPOs --25 JUSTICE BARRETT: Yeah.

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1 MR. RUSSELL: -- shares in them? 2 JUSTICE BARRETT: Yeah. MR. RUSSELL: I don't know. I mean, 3 nobody has cited this Court cases one way or the 4 other about that body of cases. 5 6 I will say what issuers --7 JUSTICE BARRETT: Maybe --MR. RUSSELL: -- can do --8 JUSTICE BARRETT: -- it's because 9 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 ends, these suits don't go forward under Section 13 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 withdraw the registration statement at the end 18 19 of the lockup period. Slack did something 20 similar in this case. After 90 days, they 21 withdrew the registration statement. And so 2.2 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

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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 liability altogether, including for all the 4 shares in the IPO, because as soon as they let a 5 6 single share, exempt share, onto the market, 7 which they can easily do, it doesn't harm their interest of the underwriters because they don't 8 9 have to let enough in that's going to affect the 10 share price, as soon as they let in even a small number of shares, we've got this intermingling 11 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 2.2 there are only --23 JUSTICE SOTOMAYOR: So let me ask you, if we find -- if we find tracing is required, 24

25 then we should do what they want, reverse,

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because you can't prove tracing? 1 2 MR. RUSSELL: No. I -- I think you 3 should leave it to the lower court. Tt is true -- you know, we pled in our complaint that 4 the shares were traceable. 5 6 But we did say during the briefing 7 that if what that means is we have to show the exemption status of every share that my client 8 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 not only plausible but virtually certain that my 21 2.2 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

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1 everybody who buys shares that are based on a price that is inflated or deflated because of a 2 3 misstatement should have a remedy. JUSTICE JACKSON: So does it matter --4 my understanding in this particular case is that 5 the direct listing itself registered certain 6 7 shares or said that some subset of all the shares that were going on the market would be 8 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 2.2 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. JUSTICE JACKSON: -- intended with 25

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1 respect to Section 11? 2 And so why is it that you can have a 3 world in which the registration statement speaks to certain shares as registered and certain as 4 not and, under your view, still implicate, all 5 6 of them, implicate Section 11? 7 MR. RUSSELL: So two responses to that. One is I think a premise of your question 8 is that registration statements identify 9 10 specifically identifiable shares, and that's not 11 the case. 12 So, if you look at the Slack registration statement here and look at the 13 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 to prove, even though we know for sure, even if 21 2.2 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

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1 statements pave the way for public offerings. 2 They do not register individual shares. 3 JUSTICE GORSUCH: Counsel --CHIEF JUSTICE ROBERTS: Well, he 4 can't -- the reason he can't is because the 5 statute says "such security." I mean, that's 6 7 the big hurdle for you to get over. I -- I don't think the -- unless your 8 9 argument is, and I'm not dismissing it in any sense, but it's simply a practicality argument, 10 11 you say that Congress must have intended 12 everybody to be able to sue and that we should not be too punctilious about looking at "such" 13 in "such security." 14 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. 2.2 You know, if my client knew that he 23 had a particular share, if he got a paper certificate, he could not look at the 24 25 registration statement and tell whether that's a

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1 registered share or not because the registration 2 statement does not say which of Mr. Butterfield's 40 million shares are 3 registered and which aren't, and that's a 4 5 problem. The -- the -- the broader point 6 7 about "such security," though, is that, you know, their premise is that Section 11 is 8 enforcing the obligations of Section 5 and 4, 9 and that's simply incorrect. 10 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. Ιt 17 instead addresses the obligations of people who 18 write registration statements and says to them 19 that you've got to be accurate. And then the question simply becomes, 20 21 what is the scope of the remedy provided when 2.2 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 statement speaks to all of the -- the valuation 4 of all of the shares in the registering -- in 5 the registered offering for which it would file, 6 7 and it's going to injure everybody who purchases in that public offering. 8 9 JUSTICE GORSUCH: You -- you spoke a -- a few moments ago and in the briefs too a 10 11 bit about this traceability requirement or 12 Section 11 is a standing question, and I -- I just want to clear that up because I -- I -- I 13 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 Twigbal standard, as 2.2 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

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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 Article III standing. They use the phrase 5 "statutory standing." 6 7 JUSTICE GORSUCH: Statutory standing. MR. RUSSELL: But I don't know that's 8 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. JUSTICE GORSUCH: -- I -- I understand 20 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 12(b)(6) stage here, that there are traceable 24 25 shares --

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1 MR. RUSSELL: Yes. 2 JUSTICE GORSUCH: -- and -- and 3 plausible facts suggesting some traceable 4 shares. That's all that would be required. MR. RUSSELL: That is correct, and 5 6 that's why, you know, we think, if you adopt our 7 interpretation of Section 11, you should disavow any suggestion that they are entitled to -- to 8 affirmance of their motion to dismiss at this 9 stage because we surely satisfied Twiqbal or 10 11 however you word it. 12 JUSTICE KAVANAUGH: Can't we leave that to the court of appeals to decide whether 13 it was forfeited or not? 14 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. 2.2 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 --

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1 JUSTICE KAVANAUGH: Yes. 2 MR. RUSSELL: -- that requires 3 registration, we don't meet Iqbal and Twombly, and I think you should reject that. 4 JUSTICE KAVANAUGH: More -- more 5 6 broadly, I think the suggestion on the other 7 side and, certainly, the amicus briefs is that this is a new thing, direct listings, and to 8 take your position here, we would have to depart 9 on Section 11 from a lot of law, starting with 10 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 it to the SEC, and I just want to make sure you 19 20 can respond to that. 21 MR. RUSSELL: Thank you. I appreciate 2.2 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

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1 share they purchased was registered or not. 2 The body of law that they are pointing to simply says you have to show that you 3 purchased under the registered offering that was 4 governed by the registration statement that you 5 6 said was misleading as opposed to issued under 7 some registration statement a few years earlier that could have been entirely accurate. None of 8 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 drawing a distinction between registered shares 13 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 2.2 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
б	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

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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'

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interpretations of Section 12, I think, arise 1 2 with respect to Section 11 as well, because they 3 are -- again, the entire premise of their argument is that the world is divided into 4 exempt shares and registered shares and 5 Section 11 applies and -- and exempt shares are 6 7 exempt from essentially everything in the 8 statute.

Section 3 does do that. Section 3 9 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. Section 4 simply, as I said before, addresses 13 the -- when certain shares can be sold and in 14 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.

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

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 expressed before is not a position that directly 4 translates to this case. They are simply 5 6 doing -- they expressed the position that Barnes 7 adopted, which is that you have to trace your shares that you purchased to the registered 8 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 just don't know. They haven't --21 2.2 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 think there would be something to fix because, 3 again, the practical consequence of adopting 4 Petitioners' position, I think, is inevitably 5 6 going to open the door to this -- their 7 strategem of letting in a few exempt shares, even in traditional IPOs, and arguing that, 8 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 2.2 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 decision then would be with respect to this much 5 6 more common, much more consequential, and 7 under-briefed issue about what happens after the expiration of a lockup period in a traditional 8 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. We recognize that that would be unfair. But we 13 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? 2.2 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

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 think at the very least, though, that the Court 4 should leave that -- that open and that should 5 be something that can get percolated, and that 6 7 may end up resolving the actual question in the context of direct listings. 8 9 And, again, I do think it is a very serious consequence of their position that 10 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 2.2 Depression was inadequate. It's not something 23 that Section 10 provides --JUSTICE SOTOMAYOR: Counsel, I think 24 25 you've answered my question. I --

1 MR. RUSSELL: I apologize. But it --2 I'm sorry. 3 CHIEF JUSTICE ROBERTS: Anything 4 further? Justice Thomas? 5 Justice Alito? 6 7 JUSTICE KAGAN: I wanted to make sure, Mr. Russell, I understood your textual argument, 8 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 2.2 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

"security" there is not "share," and it is not
 referring to individual shares, including
 because registration statements don't specify
 individual shares.

If you look at Section 7, which then 5 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 2.2 what they were, it is nonetheless the case that 23 Section 11, I think, simply doesn't follow that line of distinction. 24 That's a line of 25 distinction about the lawfulness of sales. Tt.

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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
б	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

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1 statement. It merely withdrew it with respect 2 to unsold shares. So the registration statement remained in effect. And under Respondent's 3 interpretation, there would be no end to the 4 liability potential for -- for companies that 5 issue registration statements for the full 6 7 three-year period of the -- the statute of repose, which would dramatically change the 8 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 shares, only those could be sold. 13 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 registered shares, so there's no difficulty 20 21 determining whether he sold registered shares. 2.2 Barnes did involve exempt shares as 23 well as registered shares that were already in the market. The case makes that clear. 24 25 Counsel says that there's no consensus

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1 on Section 11. That's simply incorrect. Every 2 court of appeals that had -- had addressed the question, eight courts of appeals, said that 3 what "such security" means in Section 11 is 4 shares registered under the registration 5 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 case to the contrary in the 90-year history of 13 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 2.2 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

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1 Court -- the SEC actually went on to say, even though there could be outstanding securities of 2 3 the same class, that there would still not be liability even if people had relied on the 4 registration statement with respect to those 5 other shares. So the SEC's position is 6 7 perfectly clear. Respondent says that this was a public 8 9 offering of the exempt shares. That's simply not true. If you look at Gustafson, Gustafson 10 11 defines what a public offering is. 12 A public offering is -- an offering is by -- by an issuer or a controlling shareholder. 13 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 2.2 that are not public offerings because they're exempt under Section 4, which carves out that 23 different class of offering -- of offerings for 24 25 different treatment, including under Section 12.

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If the Court has no further questions,
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 2
      I thank the Court, and we ask that the judgment
      be reversed.
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 4
                CHIEF JUSTICE ROBERTS: Thank you,
 5
      counsel. Counsel.
                The case is submitted.
 6
                (Whereupon, at 12:55 p.m., the case
 7
     was submitted.)
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