No. 22-

IN THE
Supreme Court of the United States

SLACK TECHNOLOGIES, LLC (F/K/A SLACK TECHNOLOGIES, INC.) *et al.*,

Petitioners,

v.

FIYYAZ PIRANI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 11 of the Securities Act of 1933 permits suits alleging misrepresentations in a registration statement only if the plaintiffs "acquir[ed] such security." 15 U.S.C. § 77k(a). Section 12(a)(2) of the Act provides that someone who "offers or sells a security . . . by means of a prospectus" may be liable for misstatements in that prospectus "to the person purchasing such security." 15 U.S.C. § 77*l*(a)(2). For more than 50 years, every court of appeals to consider the question has held that "such security" in Section 11 means a share registered under the registration statement the plaintiffs claim is misleading. And this Court has held that Section 12(a)(2) applies only when there is an obligation to distribute a prospectus—an obligation that exists only for registered shares. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 584 (1995); 15 U.S.C. §§ 77d, 77e. Departing from that well-established law, a divided panel of the Ninth Circuit read "such security" to mean *any* share, registered or unregistered, and held that plaintiffs suing under Sections 11 and 12(a)(2) need not prove that they bought registered shares.

The question presented is:

Whether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading.

PARTIES TO THE PROCEEDING

1. Petitioners Slack Technologies, LLC (f/k/a Slack Technologies, Inc.), Stewart Butterfield, Allen Shim, Brandon Zell, Andrew Braccia, Edith Cooper, John O'Farrell, Chamath Palihapitiya, Graham Smith, Social+Capital Partnership GP II L.P., Social+Capital Partnership GP II Ltd., Social+Capital Partnership GP III L.P., Social+Capital Partnership GP III Ltd., Social+Capital Partnership Opportunities Fund GP L.P., Social+Capital Partnership Opportunities Fund GP Ltd., Accel Growth Fund IV Associates L.L.C., Accel Growth Fund Investors 2016 L.L.C., Accel Leaders Fund Associates L.L.C., Accel Leaders Fund Investors 2016 L.L.C., Accel X Associates L.L.C., Accel Investors 2009 L.L.C., Accel XI Associates L.L.C., Accel Investors 2013 L.L.C., Accel Growth Fund III Associates L.L.C., AH Equity Partners I L.L.C., and A16Z Seed-III LLC were the defendants in the district court and the appellants below.

2. Respondent Fiyyaz Pirani was the plaintiff in the district court and the appellee below.

RULE 29.6 DISCLOSURE STATEMENT

1. Slack Technologies, LLC (f/k/a Slack Technologies, Inc.) is a wholly owned subsidiary of Salesforce, Inc., which is publicly traded (NYSE: CRM).

2. The other entity petitioners do not have any parent corporations, and no publicly held companies own more than 10% of their stock.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Pirani v. Slack Technologies, Inc.*, No. 20-16419, 13 F.4th 940 (9th Cir. Sept. 20, 2021), *reh'g denied*, Order at 1 (9th Cir. May 2, 2022);
- *Pirani v. Slack Technologies, Inc.*, No. 19-cv-05857, 445 F. Supp. 3d 367 (N.D. Cal. Apr. 21, 2020) (order denying motion to dismiss in part);
- *Pirani v. Slack Technologies, Inc.*, No. 19-cv-05857, 2020 WL 7061035 (N.D. Cal. June 5, 2020) (order certifying order denying motion to dismiss in part for interlocutory appeal); and
- *Pirani v. Slack Technologies, Inc.*, No. 20-80095 (9th Cir. July 23, 2020) (order granting petition for permission to appeal).

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Slack Technologies, LLC (f/k/a Slack Technologies, Inc.), Stewart Butterfield, Allen Shim, Brandon Zell, Andrew Braccia, Edith Cooper, John O'Farrell, Chamath Palihapitiya, Graham Smith, Social+Capital Partnership GP II L.P., Social+Capital Partnership GP II Ltd., Social+Capital Partnership GP III L.P., Social+Capital Partnership GP III Ltd., Social+Capital Partnership Opportunities Fund GP L.P., Social+Capital Partnership Opportunities Fund GP Ltd., Accel Growth Fund IV Associates L.L.C., Accel Growth Fund Investors 2016 L.L.C., Accel Leaders Fund Associates L.L.C., Accel Leaders Fund Investors 2016 L.L.C., Accel X Associates L.L.C., Accel Investors 2009 L.L.C., Accel XI Associates L.L.C., Accel Investors 2013 L.L.C., Accel Growth Fund III Associates L.L.C., AH Equity Partners I L.L.C., and A16Z Seed-III LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-30a) is reported at 13 F.4th 940. The Ninth Circuit's order denying rehearing (Pet. App. 80a-81a) is unreported. The Northern District of California's decision (Pet. App. 31a-75a) is reported at 445 F. Supp. 3d 367. The district court's order certifying its decision for interlocutory review (Pet. App. 76a-79a) is unreported.

JURISDICTION

The Ninth Circuit issued its decision on September 20, 2021. A timely petition for rehearing and rehearing en banc was denied on May 2, 2022. On July

18, 2022, this Court granted petitioners' application to extend the time to file this petition to August 31, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 11(a) of the Securities Act of 1933 provides, in relevant part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue . . .

15 U.S.C. § 77k(a).

Section 12(a) of the Act provides, in relevant part:

> Any person who . . . offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have

> known, of such untruth or omission, shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue . . . to recover the consideration paid for such security . . . or for damages if he no longer owns the security.

15 U.S.C. § 77*l*(a).

Section 15(a) of the Act provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o(a).

These three statutory provisions are set out in full in the appendix (Pet. App. 82a-91a).

INTRODUCTION

Section 11 of the Securities Act of 1933 authorizes only a "person acquiring such security" to sue for misrepresentations in a registration statement. 15 U.S.C. § 77k(a). Before this case, seven other courts of appeals had uniformly held that "such security" means a share registered under the registration

statement challenged by the plaintiff as misleading. Here, however, over a persuasive dissent by Judge Miller, the Ninth Circuit gave "such security" a new and more expansive meaning. According to the court, "limit[ing] the meaning of 'such security' in Section 11 to only registered shares," as numerous courts of appeals have done, would "undermine this section of the securities law." Pet. App. 16a-17a. Based on that policy rationale, the Ninth Circuit allowed respondent to dispense with the registered-share requirement altogether.

The Ninth Circuit's reliance on policy concerns to depart from the settled understanding of Section 11 is irreconcilable with numerous other court of appeals decisions. Plaintiffs have unsuccessfully argued for decades that various market innovations justified revisiting the requirement that Section 11 plaintiffs prove they bought shares registered under the allegedly misleading registration statement (as opposed to shares exempt from registration or registered under other registration statements). Until now, courts have consistently rejected such arguments in favor of adhering to the statutory text that Congress wrote and has elected not to amend.

The Ninth Circuit's decision also conflicts with decisions of this Court. Like the courts of appeals, this Court has emphasized that, by design, few shareholders have the right to sue under Sections 11 and 12. Those statutes reflect a tradeoff; they impose what amounts to strict liability even for innocent mistakes in disclosures but limit the right to sue to those who can prove they bought registered shares. Other statutes, by contrast—most notably, Section 10(b) of the Securities Exchange Act of 1934—authorize any shareholders to sue but require them to prove fraud.

In contravention of the carefully calibrated statutory scheme enacted by Congress, the Ninth Circuit's decision gives plaintiffs the best of both worlds—purchasers of any shares may sue, and they need not prove fraud—and threatens a dramatic expansion of liability under the Securities Act.

The Ninth Circuit's policy-driven departure from text and precedent creates needless uncertainty over who may sue under the Securities Act and upsets the careful balance struck by Congress. By making the country's largest circuit a dramatically more favorable forum for Section 11 and 12 claims than any other circuit, the decision below also virtually guarantees that all such claims will now be brought exclusively in the Ninth Circuit under the Securities Act's generous venue provision, precluding further development of the law absent this Court's review. This Court should grant certiorari to resolve the circuit conflict created by the decision below and reinforce the fundamental principle that courts interpreting statutes should focus on the text, not the purpose they assign to the Congress that wrote the text.

STATEMENT

A. Statutory Framework

The Securities Act of 1933 and the Securities Exchange Act of 1934 are the twin pillars of American securities law. The purpose of these Acts is to ensure disclosure of material information so that investors can make informed decisions whether to buy and sell securities. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1640 & n.1 (2017). To accomplish that purpose, the Acts require many securities to be registered with the SEC and to be the subject of initial and ongoing disclosures.

Registration of securities with the SEC is an important requirement of the securities laws. Securities cannot be sold unless they are registered or qualify for an exemption from registration. 15 U.S.C. §§ 77d, 77e. One commonly used exemption is Rule 144, which permits the resale of unregistered shares to members of the public under certain conditions. 17 C.F.R. § 230.144. Those who have held unregistered shares for at least a year and are not affiliates of the company are permitted to use Rule 144 to sell some of their holdings to people outside the company. *See id.* § 230.144(b). And the buyers of those shares are generally free to sell them to others without restriction. *See id.* But those shares cannot be listed and traded on a national securities exchange (such as the New York Stock Exchange, or NYSE) until the company has filed a registration statement under the Securities Exchange Act.

In addition to requiring shares to be registered or exempt from registration, the securities laws also mandate certain disclosures. The Securities Act creates a one-time disclosure obligation. If shares must be registered with the SEC before they can be offered and sold, the issuer must file a registration statement with the SEC that includes a prospectus making a thorough disclosure about the shares. 15 U.S.C. § 77e. The registration statement applies only to the shares that are registered, and the issuer pays a fee that depends on the number and offering price of the shares being registered. *Id.* § 77f(a)-(b).

The Securities Exchange Act, by contrast, creates an *ongoing* disclosure obligation for issuers of publicly traded securities, regardless of whether the securities

are registered under the Securities Act. Issuers of such securities must file quarterly and annual reports with the SEC. 15 U.S.C. § 78m.

The key liability provisions of the two Acts are Sections 11 and 12 of the Securities Act and Section 10 of the Securities Exchange Act. 15 U.S.C. §§ 77k, 77*l*, 78j. Section 11 limits the class of people who may sue to those who can prove they bought shares that were registered under the challenged registration statement, but creates strict liability even for innocent mistakes in that statement (including in the prospectus). *Id.* § 77k; *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). Section 12(a)(2), which imposes negligence-based liability, is even narrower, as it requires, among other things, a sale "by means of a prospectus" directly from the defendant seller to the plaintiff buyer. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570-71 (1995); *Pinter v. Dahl*, 486 U.S. 622, 642-44 (1988). Section 10 of the Securities Exchange Act, by contrast, does not limit the class of shareholders who may sue, but requires plaintiffs to plead and prove scienter. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007).

Because of its broader scope, Section 10 is the most common basis for securities suits in federal court. *See* Cornerstone Research, Securities Class Action Filings: 2021 Year in Review, at 13, https://bit.ly/3ze6JNl. In short, "[S]ections 11 and 12(a)(2) of the Securities Act apply more narrowly" than Section 10, "but give rise to liability more readily." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010).

B. Factual and Procedural Background

1. Slack, which offers business-collaboration software, went public on the NYSE in 2019. Pet. App. 8a. Slack did not sell shares to investors through an initial public offering, or IPO. Instead, it went public through a direct listing. *Id.*

There are two significant differences between traditional IPOs and direct listings. First, whereas IPOs are typically designed to raise capital for issuers, Slack sold no shares and made no money in its direct listing. Pet. App. 8a. Only Slack's existing shareholders did so.

Second, whereas after a typical IPO only registered shares are traded for an initial period, after a direct listing both registered *and* unregistered shares (i.e., those exempt from registration with the SEC) are immediately tradeable on an exchange. Pet. App. 8a. The reason only registered shares are immediately available for sale after a typical IPO is practical rather than legal. A company going public through an IPO already has unregistered shares that are owned by its founders, early investors, and employees. In connection with a typical IPO, the company will issue new shares that have to be registered. All those new shares will be bought by the IPO underwriters for a negotiated price, and then the underwriters will endeavor to sell them to other buyers at a higher price. *Id.* at 7a. Underwriters therefore want to ensure that the stock price will not be undercut once trading begins, so they generally require the pre-IPO shareholders to agree to a "lockup" period during which they cannot sell their unregistered shares. *Id.* As a result, before the lockup's expiration, all shares sold following a typical IPO are registered, although nothing in the securities laws requires that result. In direct

listings, by contrast, there are no underwriters, and accordingly there is no lockup, so unregistered exempt shares remain available for resale alongside the newly registered ones. *Id.* at 8a.

When Slack went public, there were 283 million Slack shares that could be sold to the market by Slack's existing shareholders. Pet. App. 23a (Miller, J., dissenting). The registration statement filed by Slack registered only 118 million of those shares. 3-ER-447. The other 165 million shares were not registered, because they were exempt from registration under Rule 144. 3-ER-540.

2. Respondent Fiyyaz Pirani bought Slack shares on the NYSE soon after the company went public. Pet. App. 8a. He does not and cannot allege that they were part of the 118 million shares registered under the registration statement filed in connection with Slack's direct listing. *See id.* at 23a-24a (Miller, J., dissenting). After Slack's stock price dropped, he nonetheless sued Slack, along with some of its officers, directors, and early investors, under Sections 11, 12(a)(2), and 15 of the Securities Act, claiming that Slack's registration statement was misleading. *Id.* at 9a (majority op.).

Slack moved to dismiss. Pet. App. 10a. It argued, among other things, that respondent could not satisfy the longstanding requirement that those suing under Section 11 must plead and prove that they bought shares registered under the challenged registration statement.

3. The district court denied Slack's motion to dismiss in pertinent part. It held that in cases involving direct listings, Section 11 does not require plaintiffs to show that they bought shares registered under the

allegedly misleading registration statement. Pet. App. 41a-50a. The court acknowledged that its decision was inconsistent with 50-plus years of cases reading Section 11 to authorize only buyers of registered securities to sue. *Id.* But it declined to adhere to the well-established interpretation of the phrase "such security" in Section 11. *Id.* Instead, the district court adopted a "broader reading" of "such security" based on its policy concern that following existing law would "completely obviate the remedial penalties" of the Securities Act. *Id.* at 48a-49a.

The district court certified its decision for interlocutory appeal. Pet. App. 76a. The court explained that this case presents a "purely legal" question because "the operative facts regarding plaintiff's purchases in the direct listing and inability to trace" his shares to the challenged registration statement "are undisputed." *Id.* at 78a. And that legal question is dispositive because if the "plaintiff lacks standing, this case will be dismissed." *Id.* at 79a. The Ninth Circuit then granted Slack's petition for permission to appeal. *Id.* at 11a.

4. A divided Ninth Circuit panel affirmed. Pet. App. 1a-22a. The majority acknowledged court of appeals precedent "limit[ing] the meaning of 'such security' in Section 11 to only registered shares," but declined to follow that precedent. *Id.* at 16a. The majority reasoned that "requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement" would "undermine this section of the securities law." *Id*. at 16a-17a.

The majority instead held that *unregistered* Slack shares also qualified as "such securit[ies]" because they "were sold to the public 'when the registration statement . . . became effective"—even though they

were not the subject of the registration statement and could have been sold in exempt transactions before the statement was filed. Pet. App. 18a. For support, the majority looked not to any statutory limits on resale, but to the rules of the NYSE, which require a registration statement to be filed before any shares (registered or unregistered) can be sold on the exchange (as opposed to in off-exchange transactions). *Id.* at 13a. In short, because no Slack shares could be sold on the NYSE until Slack filed a registration statement, the majority decided that all shares—unregistered and registered alike—must qualify as "such securities" under Section 11. *Id.* at 13a-14a. On that interpretation, there was no need for respondent to "prove purchase of *registered* shares pursuant to a particular registration statement." *Id.* at 16a.

The majority also looked to the legislative history of the Securities Act, citing a committee report stating that it was designed to protect "'the buyer of securities sold *upon a registration statement*.'" Pet. App. 16a. The majority asserted that "both the registered and unregistered Slack shares sold in the direct listing were sold 'upon a registration statement,'" and thus they all fall within the ambit of the statute. *Id.*

In response to Slack's argument that courts had uniformly required plaintiffs to prove they bought *registered* shares, the majority explained that its reluctance to follow previous case law on the meaning of "such security" was driven by policy concerns. Pet. App. 16a-18a. In the court's view, adhering to that understanding of the statute "would essentially eliminate Section 11 liability . . . in a direct listing" and "create a loophole large enough to undermine the purpose of Section 11." *Id.* at 17a-18a.

The majority then concluded that because respondent had standing to sue under Section 11, he also had standing to sue under Section 12. In interpreting this statute, too, the majority relied principally on the NYSE's rules instead of the text of the statute itself. Pet. App. 19a-20a.

Dissenting, Judge Miller explained that the majority's decision is inconsistent with long-settled law: "Until today, every court of appeals to consider the issue" had dismissed Section 11 claims when the plaintiff "cannot show that the shares he purchased 'were issued under the allegedly false or misleading registration statement.'" Pet. App. 25a-26a. He also criticized the majority opinion because it "never analyzes the text. Instead, it turns to the rules of the New York Stock Exchange." *Id*. at 27a. And the legislative history further refuted the majority's conclusion, Judge Miller explained, because "the phrase 'securities sold upon a registration statement' plainly refers to *registered securities*. It does not refer to unregistered securities, even if those securities must wait until a registration statement becomes effective before they can be sold on an exchange." *Id*. at 27a-28a (emphasis added) (citation omitted).

Because the majority's decision departs from the consistent past decisions of the courts of appeals and has no footing in the statute's text or legislative history, Judge Miller concluded it must be driven by policy considerations alone. Pet. App. 28a. But those considerations, he explained, are "neither new nor particularly concerning." *Id.* They have been raised by plaintiffs for decades, and, in any event, "are no basis for changing the settled interpretation of the statutory text." *Id.*

Finally, Judge Miller explained that respondent's inability to demonstrate that he bought registered securities was fatal not only to his Section 11 claim, but also to his Section 12 claim. Pet. App. 29a-30a. Section 12 requires the shares bought by plaintiffs to have been sold "by means of a prospectus," and a prospectus is required only for registered securities. *Id.* Judge Miller would have held that because respondent "cannot show that he purchased a registered security, . . . he lacks standing to bring" any of his claims. *Id.* at 30a.

Slack timely petitioned the Ninth Circuit for panel rehearing and rehearing en banc in November 2021. The court denied the petition on May 2, 2022. Pet. App. 80a-81a.

REASONS FOR GRANTING THE PETITION

This Court should grant review to decide whether plaintiffs suing under Sections 11 and 12(a)(2) of the Securities Act must show that they bought shares registered under the registration statement they allege is misleading. Before this case, every court of appeals to consider the question had held that they must. By holding the opposite here, the Ninth Circuit has created a lopsided circuit conflict and sown widespread confusion in securities law. This Court's review is necessary to resolve the conflict and restore clarity to this important area of the law.

Review is also necessary to eliminate the conflict between the decision below and this Court's precedents. Those precedents, like the previously uniform decisions of the courts of appeals, support a narrow reading of Sections 11 and 12.

This Court's review is urgently needed because the question presented is exceptionally important.

The decision below dramatically expands the list of shareholders who can sue in strict liability under Sections 11 and 12 and will generate substantial uncertainty about—and needless lawsuits over—when those statutes apply. The rule adopted by the Ninth Circuit—that there is potential liability under those statutes whenever a registration statement makes possible the sale on an exchange of both registered and unregistered shares—would apply not just to direct listings like Slack's, but also to traditional IPOs. Six months after a typical IPO, the lockup expires, and unregistered shares are sold in large quantities on an exchange. That happens only because a registration statement was filed. Under the rule adopted by every other court of appeals, the expiration of the lockup—and the resulting mixture of unregistered and registered shares available for trading on the exchange—generally cuts off Section 11 liability by precluding post-lockup buyers from proving that they bought registered shares. But under the decision below, *any* shareholder may sue under Section 11 until the statute of limitations expires. That interpretation will make the Ninth Circuit, already a magnet for about one-third of all securities suits, *see* Cornerstone Research, *supra*, at 30, the forum of choice for plaintiffs who, like respondent here, can sue nowhere else.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVEN OTHER CIRCUITS ON THE SCOPE OF SECTION 11.

Before the Ninth Circuit's decision in this case, "every court of appeals to consider the issue" had held that shareholders can sue under Section 11 of the Securities Act only if they can plead and prove they bought shares registered under the registration statement they claim is misleading. Pet. App. 25a (Miller,

J., dissenting). Disregarding the statutory distinction between registered and unregistered shares, the Ninth Circuit rejected the long-established registered-share requirement in this case on the theory that adhering to it "would create a loophole large enough to undermine the purpose of Section 11." *Id.* at 17a-18a (majority op.). That policy-driven holding is irreconcilable with the text of the statute and its consistent interpretation for more than 50 years.

A. Before the Ninth Circuit's decision, courts of appeals had uniformly held that Section 11 requires plaintiffs to prove they bought registered shares.

Before this case, seven other courts of appeals had decided who may sue under Section 11 of the Securities Act. All of them gave the same answer: The statute's limitation of standing to "any person acquiring such security" means that the only shareholders who may sue are those who bought shares registered under the registration statement they challenge as misleading.

The seminal decision on this subject was *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967). The question to be resolved by the Second Circuit was whether "§ 11 extends only to purchases of . . . *newly registered shares*." *Id.* at 271 (emphasis added). Judge Friendly explained that it does. The only plausible interpretation of "such securit[ies]" is "newly registered shares." *Id.* The idea that Section 11 applies to *any* shares, registered or unregistered, is "inconsistent with the over-all statutory scheme." *Id.* at 272. For example, "it seems unlikely that the section developed to insure proper disclosure in the registration statement was meant to provide a remedy for other than the particular shares registered." *Id.*

Judge Friendly further explained that, even in 1967, the issue was "not really a new one." 373 F.2d at 273. The Second Circuit had already said, albeit in dicta, that "an action under § 11 may be maintained 'only by one who comes within a narrow class of persons, i.e. those who purchase securities that are the *direct subject of the* prospectus and *registration statement*.'" *Id.* (quoting *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 782, 786 (2d Cir. 1951)) (emphasis added). That earlier opinion "carries particular weight because of its authorship by Judge Frank, a leading member of the SEC in its early days." *Id.* The contemporary SEC itself, "in a brief as amicus curiae filed in response to [the Second Circuit's] invitation," agreed that only those who bought newly registered shares may sue under Section 11. *Id.* The "leading treatise" said the same thing. *Id.* And it was up to Congress, not the courts, to decide whether there was any reason to depart from this consensus. *Id.*

Until now, courts of appeals have consistently followed the Second Circuit's lead, requiring Section 11 plaintiffs to plead and prove they bought shares registered under the supposedly misleading registration statement. The Eighth Circuit, for example, has adopted the view that "'such security' refer[s] to a security *registered under* the registration statement alleged to be defective." *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976 (8th Cir. 2002) (emphasis added). As that court explained, "we read § 11's plain language to state unambiguously that a cause of action exists for any person who purchased a security that was originally *registered under* the allegedly defective registration statement—so long as the security was indeed issued under that registration statement and not another." *Id*. at 976-77 (emphasis altered).

The Fifth Circuit has adopted the same rule, quoting approvingly from the leading securities law treatise for the proposition that "under § 11, '[s]uit may be brought by any person who has acquired a security *registered under* the 1933 Act.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 872 (5th Cir. 2003) (quoting LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 1150 (4th ed. 2001)) (emphasis added). The Fifth Circuit subsequently reiterated its adoption of the *Fischman* and *Barnes* rule, stating that "Section 11 'extends only to purchases of the *newly registered* shares.'" *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 499 (5th Cir. 2005) (quoting *Barnes*, 373 F.2d at 271) (emphasis added). Put another way, the court explained, Section 11 "limit[s] putative plaintiffs to the 'narrow class of persons' consisting of 'those who purchase securities that are the *direct subject of* the . . . registration statement.'" *Id*. at 495 (quoting *Fischman*, 188 F.2d at 786-87) (emphasis added). Because some unregistered shares were available for sale at the time certain plaintiffs in *Krim* made their purchases, they could not prove they bought only newly registered shares, and the court therefore affirmed the dismissal of their claims. *Id.* at 491-99.

Similarly, the First Circuit has held that a Section 11 action "'may be maintained only by those who purchase securities that are the *direct subject* of the prospectus and registration statement.'" *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 755 (1st Cir. 2016) (emphasis added). In *Ariad*, the court decided that "a general allegation that a plaintiff's shares are traceable to the offering in question" is insufficient to state a Section 11 claim. *Id.* at 756. Because the plaintiffs alleged they bought their shares "'on the open market'"—and therefore could not allege the

shares were newly registered—the First Circuit affirmed the dismissal of their Section 11 claim. *Id.*

Eleventh Circuit precedent is to the same effect. In *APA Excelsior III L.P. v. Premiere Technologies, Inc.*, the court held that a Section 11 plaintiff "must show that the security was issued under, and was the *direct subject* of, the . . . registration statement being challenged." 476 F.3d 1261, 1271 (11th Cir. 2007) (emphasis added).

Other courts of appeals have adopted the identical rule, sometimes putting the same point in slightly different ways. For example, courts have said that Section 11 requires the buyer to have "purchased a security *issued under the registration statement* at issue." *Joseph v. Wiles*, 223 F.3d 1155, 1158-60 (10th Cir. 2000) (emphasis added), *abrogated on other grounds by California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *accord California Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 144 (3d Cir. 2004). And courts have held that plaintiffs must "trace" their shares to the allegedly misleading registration statement. *E.g.*, *Lee*, 294 F.3d at 974-75, 977-78; *Ariad*, 842 F.3d at 755.

The foregoing cases make clear that, in the view of these courts of appeals, all of these formulations—that Section 11 applies to "newly registered shares," shares "traceable" to the challenged registration statement, or shares that are "registered under," the "direct subject of," or "issued under" that statement—have the same meaning. The opinions use these terms interchangeably, sometimes in the same sentence, to describe a fundamental limitation of Section 11: only buyers of shares registered under the registration statement at issue may sue. *E.g.*, *APA Excelsior*, 476 F.3d at 1271 (requiring proof "that the security was

issued under, and was the direct subject of, the . . . registration statement being challenged"); *Lee*, 294 F.3d at 974, 976 ("direct tracing," "issued under," and "registered under"); *Ariad*, 842 F.3d at 755 ("direct subject of" and "trace"); *Barnes*, 373 F.2d at 271-73 ("newly registered shares," "the particular shares registered," and "direct subject of"). Whichever verbal formulations these courts of appeals chose to make the point, it was always the *same* point—that the words "such security" in Section 11 mean that plaintiffs must prove they bought shares registered under the challenged registration statement.

B. The Ninth Circuit's decision cannot be reconciled with previous cases addressing the scope of Section 11.

Here, the Ninth Circuit decided that adhering to this well-established interpretation of "such security" "would undermine" Section 11. Pet. App. 17a. The court reasoned that *all* Slack shares, registered and unregistered alike, should be considered "such securities" within the meaning of Section 11 because under the rules of the NYSE, none of them could have been traded on that exchange without the filing of the challenged registration statement. *Id.* at 15a. In other words, because unregistered securities could not be sold on the NYSE without the registration statement, they should be treated the same as registered shares for Section 11 purposes.

That conclusion is directly contrary to the long line of cases, beginning with *Barnes*, holding that Section 11 plaintiffs must prove they bought shares registered under the registration statement they claim is misleading. Judge Friendly rejected the contention that Section 11 "was meant to provide a remedy for other than the particular shares registered." *Barnes*,

373 F.2d at 272. In direct contrast, the Ninth Circuit accepted that contention, and rejected the previously uniform rule that Section 11 plaintiffs must “prove purchase of *registered* shares pursuant to a particular registration statement.” Pet. App. 16a.

The Ninth Circuit disregarded *Barnes* and the many other cases interpreting Section 11 because, in its view, those cases all “dealt with successive registrations,” whereas this case involves “a direct listing, where only one registration statement exists.” Pet. App. 13a. But the court was wrong to think that those other decisions all turned on the existence of multiple registration statements, and the implications of the Ninth Circuit’s rationale are both illogical and breathtaking.

Consider, for example, the Fifth Circuit’s decision in *Krim v. pcOrder.com*. There were indeed two registration statements in that case, one related to an IPO and the other to a secondary offering. 402 F.3d at 491. But the problem for one plaintiff was not that there were multiple registration statements. He bought his shares after the filing of the first registration statement but before the second, so he could not have yet owned shares registered under the second statement. *Id.* at 492. The problem instead was that by the time the plaintiff bought his shares, a small number of unregistered shares held by insiders had entered the market and “intermingled with the IPO shares,” as typically happens in an IPO after expiration of the lockup period. *Id.* Registered shares accounted for 99.85% of all available shares, and it was close to a statistical certainty that the plaintiff owned at least one registered share, but the Fifth Circuit held that he nevertheless could not sue under Section 11. *Id.* at 492 & n.6. Accepting the plaintiff’s

"statistical tracing" theory would allow "*every* aftermarket purchaser" to sue, "despite the language of Section 11, limiting suit to 'any person acquiring *such* security.'" *Id.* at 496-47.

Krim is thus materially indistinguishable from this case. In each case, because the plaintiff purchased at a time when only one registration statement was operative but the market contained both registered and unregistered shares, the plaintiffs could not prove which they bought. The Fifth Circuit held that this lack of proof precludes a Section 11 suit; the Ninth Circuit held the opposite.

Unregistered shares like those at issue in *Krim* and this case are often eligible to be sold "over the counter" before any registration statement is filed. *See* Pet. App. 8a. Once a registration statement is filed, the shares also generally can be traded on a national exchange. *Id.* at 14a. As the Fifth Circuit held, unregistered shares that can be traded on an exchange are still unregistered shares—not "such securit[ies]" that could give rise to Section 11 liability. *Krim*, 402 F.3d at 498-500. According to the Ninth Circuit, by contrast, the fact that unregistered shares have become eligible to be traded on an exchange transforms their character for purposes of Section 11 liability, making them the functional equivalent of registered shares. Pet. App. 15a. But there is no basis in the statute for this erasure of the distinction between registered and unregistered shares.

The majority's effort to distinguish this case from successive-registration cases also fails to eliminate the conflict between the rule it adopted and the contrary rule adopted by all the other courts of appeals, which precludes suit by plaintiffs who did not purchase shares registered under the allegedly

misleading registration statement. As Judge Miller observed in response to the majority's effort to distinguish between successive-registration cases and this case, "nothing in the reasoning" of other Section 11 cases "suggests that the distinction should matter." Pet. App. 26a. Those cases turn not on their particular facts, but on a consistent interpretation of the statute—namely, that it requires plaintiffs to prove they bought shares registered under the supposedly misleading registration statement. *Id.*

The rule adopted by the Ninth Circuit would apply to *any* case where registered and unregistered shares trade on an exchange after the filing of a single registration statement; its logic cannot be limited solely to cases involving direct listings. It plainly applies, for example, to cases involving traditional IPOs as in *Krim*, where the majority rule dictated that one of the plaintiffs could not sue under Section 11 because he bought at a time when there was only one registration statement on file but the pool of available shares included some unregistered shares sold by insiders. 402 F.3d at 491. The Ninth Circuit's rule would also apply to any case where there has been a secondary offering—that is, where a company has filed multiple registration statements—so long as the misrepresentation alleged by the plaintiff appears in both registration statements. In either of these circumstances, unregistered shares would be available on an exchange alongside registered shares only because of the filing of an allegedly misleading registration statement—and would therefore would qualify as "such securit[ies]" under the Ninth Circuit's interpretation of the phrase. Pet. App. 18a (share qualifies as "such security" if it became eligible to be "sold to the public [i.e., on an exchange] when 'the registration statement . . . became effective'").

The Ninth Circuit said this interpretation was necessary to avoid opening a potential "loophole" that would allow issuers to avoid Section 11 liability. Pet. App. 17a-18a. But that concern is not new: Courts had uniformly held for decades that Section 11 cannot be interpreted differently simply because new developments in the marketplace, including new offering types, might limit its application. As Judge Miller noted, "[t]he plaintiffs in *Barnes* made precisely the same point about section 11 liability for secondary offerings, where, as they pointed out, it would be 'impossible to determine whether previously traded shares are old or new.'" Pet. App. 28a. But the court rejected the plaintiffs' request to "depart[] from the more natural meaning" of Section 11, explaining that any policy concerns were better directed to Congress than the courts. 373 F.2d at 273.

In short, the Ninth Circuit's decision conflicts with five-plus decades of precedent on the meaning of Section 11—and for a reason that, for just as long, has been rejected by courts mindful of the limitations on their own power. The decision below is an open invitation to securities plaintiffs to file all future Section 11 and 12 suits in the Ninth Circuit, particularly when (as in this case) those suits would not survive a motion to dismiss in any other circuit. This Court should grant review to resolve the conflict in the courts of appeals and head off further attempts to expand the scope of liability under Sections 11 and 12.

II. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S DECISIONS.

The Ninth Circuit's interpretation of the scope of Sections 11 and 12 of the Securities Act also conflicts with decisions of this Court making clear that those

statutes require plaintiffs to plead and prove that they bought *registered* shares.

The Ninth Circuit decided that, when shares are available for trading on an exchange only because of the filing of a registration statement, *any* shares, including unregistered exempt ones, qualify as "such securit[ies]" for purposes of Section 11. Pet. App. 12a-18a. And that means any buyer of any shares may sue the issuer, its directors, and its officers under the loosened liability standards of Sections 11 and 12. *Id.* at 15a-21a. That holding cannot be reconciled with decisions of this Court explaining that those strict-liability statutes authorize only a much narrower class of shareholders to sue.

In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court outlined the differences between Section 11 of the Securities Act and Section 10 of the Securities Exchange Act. Section 11 is "limited in scope," allowing only "purchasers *of a registered security* to sue." *Id.* at 381 (emphasis added). If a plaintiff proves that he bought registered shares and that the issuer made a material misstatement or omitted material information, then "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements." *Id.* at 381-82. Section 10 has the opposite features: "[A] Section 10(b) action can be brought by a purchaser or seller of '*any* security,'" but "a Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i.e.*, with intent to deceive, manipulate, or defraud." *Id.* Section 11 thus strictly limits the purchasers who may sue but imposes virtually absolute liability, whereas Section 10(b) allows any purchaser or seller to sue but makes it difficult to prevail.

This Court has made clear that much the same tradeoff applies in Section 12 cases. The statute requires plaintiffs to plead and prove that they bought securities "by means of a [misleading] prospectus." 15 U.S.C. § 77*l*(a)(2). Section 12(a)(2) applies only if "there is an obligation to distribute the prospectus in the first place"—that is, in connection with a "public offering." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570-71 (1995). And the obligation to distribute a prospectus applies only to registered shares—not to shares exempt from registration. 15 U.S.C. §§ 77d, 77e. In other words, as Judge Miller correctly concluded, Section 12 is like Section 11: It authorizes only "those who have 'purchas[ed] such security'"—a registered share—to sue. Pet. App. 29a (Miller, J., dissenting). And respondent's inability to plead and prove he bought shares registered under the registration statement he claims misled him means that his Section 12 claim should have been dismissed. *Id.* at 30a.

The Ninth Circuit's decision is at odds with how this Court interpreted the Securities Act in *Herman & MacLean* and *Gustafson*. Those decisions confirm that Section 11 is "limited in scope" and authorizes only "a purchaser of a registered security" to sue. *Herman & MacLean*, 459 U.S. at 382. Under the decision below, by contrast, it makes no difference whether shares were registered or unregistered; *any* shares can qualify as "such securit[ies]" under the statute and authorize shareholders to sue.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Unless overturned, the Ninth Circuit's abandonment of the longstanding distinction between registered and unregistered shares will have far-reaching adverse consequences that necessitate prompt review.

First, as noted above, the logic of the Ninth Circuit's decision cannot be limited to direct listings. It applies equally to *any* case in which unregistered and registered shares are trading on an exchange as a result of the filing of a registration statement.

Consider IPOs, for example, a common feature of which is a six-month lockup period for insiders' unregistered shares. Under the rule that prevailed across the country before this case—that plaintiffs must prove they bought shares registered under the challenged registration statement—the end of the lockup period would typically cut off potential liability under Sections 11 and 12. *See, e.g.*, *Krim*, 402 F.3d at 492; Pet. App. 46a. Once the lockup period expired, insiders could sell their unregistered exempt shares on an exchange, registered and unregistered shares would intermingle, and it would generally be impossible for new buyers to prove that they bought only registered shares. That logic no longer holds under the Ninth Circuit's decision in this case. The court held that purchasers of unregistered securities may sue under Section 11 when, as here, a registration statement was necessary before those shares could be traded on an exchange. But that is true in a typical IPO no less than in this case, once the lockup period has expired. Under the Ninth Circuit's reasoning, plaintiffs could sue on the theory that the only reason they were able to buy any shares on a public market was by virtue of the filing of a supposedly misleading registration statement, and so it makes no difference whether they can prove that the shares they bought were registered.

Respondent may contend that the Ninth Circuit's decision applies only to direct listings, not IPOs. But that argument would be wrong for two reasons. First,

it is impossible to square with the Ninth Circuit's rationale and judgment, which turns entirely on the existence of a registration statement that "makes it possible to sell both registered and unregistered shares to the public," i.e., on an exchange. Pet. App. 14a-15a. Second, the majority below denied the proposition that it was giving the phrase "such security" a meaning specific to direct listings, explaining that "[t]he words of a statute do not morph because of the facts to which they are applied." *Id.* at 13a-14a. Indeed, this Court has squarely rejected efforts to "render every statute a chameleon" and "establish . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 382, 386 (2005); *accord, e.g.*, *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality op.) (rejecting notion of "giving the same word, *in the same statutory provision*, different meaning *in different factual contexts*").

Because the Ninth Circuit interpreted the Securities Act in a way that cannot be limited to direct listings, and because that interpretation is entirely at odds with decades of precedent, the decision below invites needless litigation over previously settled issues. In closing one purported loophole, the Ninth Circuit opened another, inviting plaintiffs far and wide to sue under the Act without satisfying the prerequisites imposed by Congress. That unintended consequence is only one reason courts should not be in the business of resolving policy disputes over the intended scope of the Act. Another is the separation of powers: if the supposed loophole identified by the Ninth Circuit is viewed as concerning, Congress can close it. Or the SEC can—for example, by requiring lockups preventing the sale of any unregistered shares for a set period after any direct listing. If the policy concern

expressed by the Ninth Circuit justifies a policy response, it must be a legislative or administrative one, not a judicial one.

Second, the Ninth Circuit's decision upsets the careful balance struck by Congress when it passed the Securities Act and the Securities Exchange Act. The two Acts "constitute interrelated components of the federal regulatory scheme governing transactions in securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). Accordingly, they "should be construed harmoniously." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Specifically, each must be read "so as not to eviscerate requirements for recovery" under the other. *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 692 (3d Cir. 1991). But that is precisely what the Ninth Circuit has done in holding that *any* buyer of Slack shares may sue under Sections 11 and 12 of the Securities Act.

Sections 11 and 12 impose "virtually absolute" liability, "even for innocent misstatements," but they are "limited in scope" because they severely curtail the class of shareholders who may sue. *Herman & MacLean*, 459 U.S. at 381-82. Section 10, by contrast, "is a 'catchall' antifraud provision" that permits any shareholder to sue, but "requires a plaintiff to carry a heavier burden to establish a cause of action"—namely, the burden to "prove that the defendant acted with scienter." *Id.* at 382. By eliminating the standing requirements of Sections 11 and 12, the Ninth Circuit has "render[ed] superfluous any claim for the same grievance under section 10(b) with its more stringent burdens of proof," thereby "overrul[ing], *sub silentio*, section 10(b) as a remedy for purchasers." *Ballay*, 925 F.2d at 692-93 & n.13. Plaintiffs will not

shoulder the burden of proving fraud under Section 10(b) when, under the Ninth Circuit's decision, they could instead bring strict-liability claims for the same or greater damages under Sections 11 and 12.

The Ninth Circuit thought it necessary to super-charge those statutes to protect investors. The panel majority believed that if it applied the established rule to this case issuers would, "from a liability stand-point," choose to go public through direct listings and "would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price." Pet. App. 17a. But that is plainly wrong. For one thing, in a direct listing like Slack's, the issuer raises no capital, so increasing its share price would not add a penny to its coffers. More fundamentally, Sections 11 and 12 are only two small parts of the laws regulating securities, and issuers would have ample reasons to make every effort to avoid securities fraud claims no matter how this case is decided. On top of suits under Sections 11 and 12, issuers are always at risk for private securities fraud class actions under Section 10(b), as well as SEC enforcement actions—including under Section 17, which creates liability even for negligent misstatements, 15 U.S.C. § 77q. No rational issuer would be "incentivized" to engage in securities fraud merely because it may be difficult for shareholders to prove a claim under Sections 11 and 12.

By contrast, the prospect of dramatically expanded opportunities for winning relief under Sections 11 and 12, without the necessity of proving fraud under Section 10(b), will greatly impact private securities litigation. Plaintiffs' lawyers will look to challenge any information in registration statements that, with the benefit of hindsight, appears misleading—

and therefore might be a basis for potentially ruinous strict liability. None of this will help investors, who ultimately bear the costs of these gotcha securities suits. *See, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1585 (2006).

In short, the majority incorrectly collapsed the important distinction between registered and unregistered shares—which had previously informed decades of precedent on the question whether Section 11 applies—because, in its view, maintaining that distinction would be bad policy. But "'Congress wrote the statute it wrote'—meaning, a statute going so far and no further." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). The text of Sections 11 and 12 makes clear that they may be invoked only by those who bought registered shares. The majority's contrary conclusion risks enlarging those statutes' scope to the point that they eclipse remedies designed by Congress to address only actual fraud—and will make the Ninth Circuit a hotbed for Securities Act litigation that would be viable nowhere else.

Third, the decision below discourages innovation in the capital markets. Companies have long gone public mostly through IPOs. That method has its virtues, but it also has its vices—including that it can be a very expensive way for a business to raise capital. For companies like Slack, which did not need to raise capital, the transaction costs of IPOs might be too high to make going public through an IPO worthwhile. Novel methods of going public, such as direct listings, therefore have an important role to play by reducing transaction costs and bringing more companies to the public markets. Going public benefits

everyone: Investors gain the ability to more easily own part of a business and obtain enhanced access to financial information through mandatory disclosures; the company secures the option to make further public offerings to raise capital; and its employees obtain the opportunity to convert their stock-option shares to cash more easily and diversify their holdings.

The rule adopted by the Ninth Circuit will undoubtedly deter some companies from going public. Because the logic of the court's decision applies to *any* method of going public, that deterrence will extend beyond direct listings to IPOs as well. But even if the decision could be limited direct listings, the adverse impact of the decision would still be substantial. Businesses contemplating a public listing need to be certain about the potential scope of their liability under the various securities laws. They will avoid new methods of going public if those methods are subject to the risk that courts will reinterpret familiar statutes in new and unpredictable ways. That is especially true in cases like this one, where Slack earned nothing from its direct listing. *See* Pet. App. 8a. If only IPOs are thought to provide certainty about potential liability—a proposition that is now highly doubtful by virtue of the decision below—then the choice will be between going public through an IPO and not going public at all. Well-capitalized companies like Slack may well take the latter course, robbing all market participants of the many benefits that public trading of those companies' shares would bring.

Fourth, the Ninth Circuit's decision "introduces an element of uncertainty into an area that demands certainty and predictability." *Pinter*, 486 U.S. at 652. Uncertainty in securities law "can lead to many undesirable consequences," including by "increas[ing] the

costs of doing business and raising capital." *Pacific Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 157 (2d Cir. 2010). American capital markets are the deepest and most valuable in the world in no small part because securities have been regulated in a consistent and coherent way for nearly a century. The Ninth Circuit's decision creates significant doubt about the outcome of future securities cases—about how broadly this new interpretation of "such security" applies and about how courts will interpret securities laws in light of market innovations like direct listings. If statutory text and longstanding interpretations can yield to any panel's view of the securities laws' broad remedial purposes, it will be needlessly difficult for market participants to predict how courts will receive future market innovations.

In short, the logic of the decision below necessarily extends beyond direct listings, and it has drastically expanded liability under Sections 11 and 12. It will inevitably generate excessive lawsuits, discourage innovation in the capital markets, and create needless doubt about the application of the securities laws. This Court should grant review and confirm that Sections 11 and 12 do in fact require plaintiffs to prove they bought shares registered under the challenged registration statement, and that it is up to Congress, not the courts, to decide otherwise.

IV. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW OF THE QUESTION PRESENTED.

This dispute boils down to one important legal question: Do plaintiffs suing under Sections 11 and 12 need to prove they bought registered shares? If the answer is yes, that ends this case, because respondent does not allege (and admits he cannot allege) that he bought registered shares. As the district court

correctly concluded in certifying this issue for interlocutory review, "Whether plaintiff has standing under the Securities Act is a controlling issue of law." Pet. App. 78a.

This case not only presents a clean legal issue, but also is an excellent vehicle for deciding it. The circuit conflict created by the decision below is unlikely to arise again in other circuits, because plaintiffs suing under Sections 11 and 12 now have a compelling incentive to file suit in the Ninth Circuit and nowhere else. The Securities Act's venue provision allows suits to "be brought in the district where the offer or sale took place," or "in the district wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 77v(a); *see also Sec. Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985) (securities laws "'grant potential plaintiffs liberal choice in their selection of a forum'"). And the Act's nationwide service-of-process provision has been interpreted to give district courts "jurisdiction over any party with minimum contacts with the United States." *SEC v. Ross*, 504 F.3d 1130, 1140 (9th Cir. 2007). Because stocks are traded across the country, plaintiffs can pick whatever forum they like, and they will now pick only the Ninth Circuit when suing under Sections 11 and 12. Accordingly, there is no reason to await further appellate decisions, and immediate review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 31, 2022