No. 22-200

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

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRAGAR EAGEL & SQUIRE, P.C.
Lawrence P. Eagel
Counsel of Record
810 Seventh Avenue, Suite 620
New York, New York 10019
212-308-5858
eagel@bespc.com

and

Melissa A. Fortunato
Marion C. Passmore
BRAGAR EAGEL & SQUIRE, P.C.
580 California Street, Suite 1200
San Francisco, California 94104
415-568-2124
fortunato@bespc.com
passmore@bespc.com

Attorneys for Respondent

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit resolved an issue of first impression and correctly held that a purchaser of registered and unregistered securities simultaneously sold under and pursuant to Slack's first and only registration statement is a purchaser of "such security" as that term is used in Section 11 of the Securities Act of 1933 and therefore has standing to sue for misrepresentations and omissions in that registration statement under Section 11 and prospectus under Section 12(a)(2) of the Securities Act of 1933.

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INTRODUCTION

The Petition for Writ of Certiorari ("Petition" or "Pet.") does not present an important social or political issue, nor are the capital markets suffering or likely to do so in the future because of the Ninth Circuit's decision. There are in fact no compelling reasons to grant the Petition. Direct listings were first introduced in 2018 upon approval by the U.S. Securities and Exchange Commission ("SEC") of a New York Stock Exchange ("NYSE") proposed rule to allow for the sale of already issued securities to the public without the traditional initial public offering ("IPO") *if, and only if,* an effective registration statement was on file.[1] Typically, there is no difference between shares that are registered and sold in a direct listing offering, and shares that are not registered and sold. All are the same type and class of common shares that had previously been issued to investors or insiders in exempt offerings and all are sold to the public at *one time* on a national exchange, and allowed to do so only because of the filing of the first and only effective registration statement. The Ninth Circuit properly concluded that the simultaneously released shares, registered and unregistered, were sold upon and pursuant to the registration statement, and that purchasers of those publicly sold shares were purchasers of "such security" with

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[1] NYSE, § 102.01B, Footnote E; Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 83 Fed. Reg. 5650, at 5651 (Feb. 2, 2018) ("SEC Approval 2018).

standing to sue under Sections 11 and 12(a)(2) of the Securities Act of 1933 ("Securities Act"). Petitioners' Appendix ("Pet. App.") at 12a-21a.

The Ninth Circuit's decision is not in conflict with decisions of other courts of appeals. While other courts of appeals have found that to have standing under Section 11 purchasers must "trace" their securities to a particular registration statement, those courts have done so in differing contexts, most notably where there are multiple registration statements on file. The judge-made tracing requirement made sense in those instances because with more than one effective registration statement, to have standing, purchasers had to have bought securities based upon, or traceable to, the registration statement that had the alleged misstatement or omission. With Slack Technologies, LLC's (f/k/a Slack Technologies, Inc.) ("Slack") direct listing there is no chance that purchasers bought shares based on a registration statement that did not have the alleged misrepresentations or omissions.

Under the applicable SEC rules, regardless of whether the securities were registered or unregistered, the securities could not be sold to the public on a national exchange without an effective registration statement being on file. In Slack's case, all of the shares sold to the public, registered and unregistered, were previously issued shares of Slack's Class A common stock. Under the circumstances, all of the securities that were purchased

fit neatly into the term "such security" in Section 11.

The SEC has commented on, and rejected, concerns raised in 2020 about potential traceability issues when it expanded the direct listing rules to allow for Primary Direct Floor Listings.[2] The SEC rejected the notion that it was clear that purchasers would not have standing under Section 11 in the direct listing context because of the sale of registered and unregistered shares at the same time. *Id*. at 85,816. Instead, the SEC noted that it expected the "judicial precedent on traceability in the direct listing context to evolve, but the Commission [was] not aware of, nor have commentators pointed to, any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims." *Id*. Since those comments, the Ninth Circuit affirmed the district court's holding here, and the full Ninth Circuit panel refused to consider the issue *en banc*. No other district or circuit court has considered the issue of whether tracing was required in the context of a direct listing.

The Ninth Circuit's holding is also consistent with the statutory text in Section 11. Section 11 *does not* say, as Petitioners erroneously argue, that only purchasers of "registered" securities are purchasers of "such security" and can sue for misrepre-

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[2] Order Approving a Proposed Rule Change To Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807 (Dec. 22, 2020) ("SEC Approval 2020").

sentations or omissions in the registration statement. *See* 15 U.S.C. 77k; Pet. App. at 82a-88a. The word "registered" does not appear in Section 11. *Id*. Congress could have used that word if it intended to limit Section 11 to only registered securities, but it chose not to do so. The focus of Section 11 is on the false or misleading registration statement, when such statement became effective, and not on whether the securities are registered. The Ninth Circuit correctly held that the phrase "such security" includes purchases of registered and unregistered shares of the same type and character that were sold upon and pursuant to the registration statement at the same time. Pet. App. at 12a-18a.

The Ninth Circuit's holding is also consistent with the language of Section 5 of the Securities Act. 15 U.S.C. § 77e. Section 5 makes it unlawful to publicly sell a security unless a registration statement is in effect as to such security. *Id*. There is no reference or limitation in Section 5 to shares having been registered in the required registration statement. *Id*. Rather, what is required is that a registration statement be in effect as to such security. *Id*. Interpreting the phrase "such security" in Section 11 to include registered and unregistered shares of the same security where there is only one registration statement in effect as to such security that allowed for the public sale is consistent with Section 5's use of the same term.

Petitioners' cries of uncertainty and havoc if the Ninth Circuit's decision is allowed to stand are unfounded. There has been no dearth of fund rais-

ing. And, even before the district court's decision regarding Slack, there were only a minimal number of direct listings.

This Court need not concern itself with some draconian outcome if the Ninth Circuit decision is affirmed, nor should the Court wrestle with the thicket of applicable SEC rules and regulations without a fulsome district and circuit court review of the issues. There is simply no compelling reason for the Court to grant the Petition.

STATUORY PROVISIONS INVOLVED

This case concerns Petitioners' liability under Sections 11 and 12 of the Securities Act for issuing a materially false and misleading registration statement. The Securities Act was enacted by Congress, along with the Securities Exchange Act of 1934 ("Exchange Act"), to protect investors, and requires the issuance of a registration statement to sell public securities.[3] The registration statement must meet certain statutory requirements and be effective prior to the public sale of securities on a national exchange.

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[3] S. Rep. No. 47, 73d Cong. 1st Sess. 1 (1933), *reprinted in* 2 Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934 item 17 at 1. *See also* 77 Cong. Rec. 937 (Mar. 29, 1933) (Message of President Franklin D. Roosevelt) ("There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.").

Section 5 makes it unlawful to sell securities without a registration statement. 15 U.S.C. § 77e. Section 5 provides, in relevant part, that:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly
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> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> (b) It shall be unlawful for any person, directly or indirectly:
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title unless such prospectus meets the requirements of section 10; or

> (2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.
>
> (c) It shall be unlawful for any person, directly or indirectly to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

15 U.S.C. §§ 77e(a) – (c).

Section 4 provides an exemption from the registration and other reporting requirements for transactions "by any person other than an issuer, underwriter, or dealer," and circumstances not involving a public offering. 15 U.S.C. § 77d. But those exemptions are narrow so as not to hinder the Securities Act's broad construction. *SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017). As the SEC laid bare, Congress' exemptions to the regis-

tration requirements under Section 4 "were provided for certain types of securities and securities transactions where there was no practical need for registration or where the benefits of registration were too remote." 37 Fed. Reg. 592 (citing H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933)).

Sections 6 through 8 of the Securities Act govern the methods and costs of registration and content of registration statements, requiring companies issuing new securities to the public to disclose certain specific information. 15 U.S.C. §§ 77f – h.

Section 11 imposes liability for untrue statements of material fact or omissions of material facts in registration statements. 15 U.S.C. § 77k(a). It provides:

> 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); Pet. App. at 82a.

The language used by the House of Representatives Committee on Interstate and Foreign Commerce in summarizing Section 11 made clear that Congress intended Section 11 to apply to securities

purchased pursuant to a false and misleading registration statement. Specifically, the summary states:

> Inasmuch as the value of a security may be affected by the information given in the registration statement, irrespective of whether a particular sale takes place in interstate or intrastate commerce, the civil remedies accorded by this subsection against those responsible for a false or ***misleading statement filed with the Federal Trade Commission are given to all purchasers regardless of whether they bought their security at the time of the original offer or at some later date*** . . . . In this connection, it must be borne in mind that no one is obliged to register a security under this act unless he desires to make use of the mails or of the channels of interstate or foreign commerce in the distribution of the security. But if a person does avail himself of the privilege of registration accorded by this act, it is obviously within the constitutional powers of Congress to ***accord a remedy to all purchasers who may reasonably be affected by any statements in the registration statement.***

H.R. Rep. No. 73-85, at 22 (1933) (the "Conference Report") (emphasis added).

STATEMENT OF THE CASE

A. Direct Listings

A direct listing is a relatively new mechanism, first approved by the SEC for the NYSE in February 2018 and for Nasdaq in March 2019, whereby a company's shares held by early investors or insiders could be listed on a public exchange without the company undergoing a formal public offering. Pet. App. at 7a-8a; *see also* NYSE, § 102.01B, Footnote E; SEC Approval 2018, 83 Fed. Reg. at 5651. At the time direct listings were first approved by the SEC, the company itself could not sell shares in the listing and, therefore, could not raise capital. *Id.*

The direct listing registers certain of a company's shares held by early investors and insiders which had to be registered because they did not meet Rule 144's holding requirements for resale, and creates a public market for those shares. 17 CFR § 230.144. At the same time, the direct listing also creates a public market for the same type of shares that could be resold without having to be registered because they met the SEC holding requirements for exempt securities. Notably, the rules allowing direct listings require that the company file a registration statement to complete a direct listing, subject to SEC review and comment, for at least some portion of the shares that would be eligible to be sold to the market. *Id.*

Attorneys at Latham & Watkins, LLP, the firm that advised Slack in its direct offering[4], published an article encouraging companies to use direct offerings to skirt Section 11 liability.[5] The *Law.com* article states:

> In this article, we discuss another important advantage of the direct listing: the potential to deter private plaintiffs from bringing claims under Section 11 of the Securities Act of 1933, which imposes strict liability for material misstatements or omissions in registration statements.
>
> The primary reason a direct listing could deter litigation is by restricting the class of persons who have standing to sue under Section 11.

The authors explain that it is "difficult (if not impossible)" to meet Section 11's tracing requirement in "mixed market" situations, "where regis-

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[4] Latham & Watkins LLP, Latham & Watkins Represents Financial Advisors in Slack Direct Listing, *Technology unicorn is only the second large company to use a direct listing approach to become public* (June 20, 2019), https://www.lw.com/news/latham-watkins-represents-financial-advisers-in-slack-direct-listing (last visited Jan. 26, 2022).

[5] Andy Clubok, Gavin Masuda, Gregory Mortenson, Morgan Whitworth, Greg Rodgers and Brittany Ruiz, *Complex and Novel Section 11 Liability Issues of Direct Listings,* ALM|LAW.COM Corporate Counsel (Dec. 20, 2019), https://www.law.com/corpcounsel/2019/12/20/complex-and-novel-section-11-liability-issues-of-direct-listings/?slreturn=20220928204408.

tered and unregistered shares are comingled in the market." *Id.*

On August 26, 2020, the SEC approved the NYSE's proposal to permit companies to sell shares directly to the public in direct listings. *See* Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings, SEC Release No. 34-89684 (Aug. 20, 2020). Certain commentors had expressed concerns that such a direct listing would effectively obviate the applicability of Section 11 to the registration statement because the company would sell registered shares at the same time that investors would sell exempted shares. In addressing investor concern, the SEC referred to the district court decision in this action, noting:

> Although judicial precedent on this topic may continue to evolve, the Commission is aware of only one court that has considered this issue in the direct listing context to date, ***and that court ruled in favor of allowing the plaintiffs to pursue Section 11 claims***.

Id. at p. 26 (emphasis added). Thus, in approving the NYSE rule change, the SEC acknowledged the district court's holding below that investors who purchased in connection with a direct listing had standing to bring a Section 11 claim despite the inability to trace their shares to those that were "registered".

B. Relevant Factual Background

In 2019, Slack issued a materially false and misleading Registration Statement regarding, *inter alia*, Slack's 99.99% uptime guarantee and its material negative effect on the company's financial position. Pet. App. at 34a-36a. Slack issued the Registration Statement in furtherance of its plan to take the company public so that its venture investors and executive officers could sell their common stock on the NYSE. *Id.* at 32a-33a. Some of the previously issued stock that would become publicly tradable on the NYSE was registered, but most of it was not. *Id.* at 33a-34a. The sale of registered and unregistered shares on the NYSE could not have occurred without the filing of, and effectiveness of, the Registration Statement. *Id.* at 45a. On June 20, 2019, Slack shares began trading on the NYSE at a price of $38.50 per share. *Id.* at 33a, 36a.

This action was filed on September 19, 2019, alleging violations of Sections 11, 12, and 15 in connection with Slack's direct offering.

C. The District Court Holds That Respondent Has Standing

On April 21, 2020, the district court granted in part and denied in part Petitioners' motion to dismiss. Pet. App. at 31a-75a. As to standing, the district court analyzed the interpretation of "such security" in Section 11 by other courts, recognizing the judge-made rule requiring plaintiffs to "trace

their shares back to the relevant offering" in order to plead standing. *Id.* at 41a-45a. The district court rightly noted that the judge-made rule addressed the issue where there were multiple registration statements. *Id.* at 43a-44a.

The district court also recognized that the "precise issue before this Court [is] one of first impression" because the direct listing was "the result of a new regulatory development approved by the SEC in 2018." *Id.* at 45a. Returning to the statutory text and using the "canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent," the district court found that the "unique circumstances" at hand, "where shares registered under the Securities Act become available on the first day simultaneously with shares exempted from registration" warranted a reading of "such security" to mean "acquiring a security of the same nature as that issued pursuant to the registration statement." *Id.* at 47a-48a. According to the district court, this "broader" reading did not conflict with the first judge-made tracing interpretation in *Barnes v. Osofsky*, 373 F.2d 269 (2d. Cir. 1967), as Judge Friendly explicitly recognized that a broader reading of "such security" "would not be such a violent departure from the words that a court could not properly adopt it if there were good reason for doing so." Pet. App. at 48a (citing *Barnes*, 373 F.2d at 271). The district court held the same for the Section 12 claims. *Id.* at 54a.

D. The Court Of Appeals Affirms The District Court's Holding That Respondent Has Standing

On September 20, 2021, the Ninth Circuit affirmed the district court's decision. Pet. App. at 1a-30a. In affirming, the Ninth Circuit stated that the "district court is correct that this is a case of first impression." *Id.* at 13a. Relying on the language of Section 11, the legislative history, and the purpose underlying the federal securities laws, the Ninth Circuit concluded that the securities at issue, both registered and unregistered, were "sold upon" Slack's Registration Statement. *Id.* at 12a-18a.

The Panel "look[ed] directly to the text of Section 11 and the words 'such security'" in reaching its decision and found that because Slack's unregistered shares could not be publicly sold without the "only operative registration in existence" that those shares are "'such securities' within the meaning of Section 11." *Id.* at 14a-15a. The Panel also found that because there was only one registration statement, the judge-made traceability problem identified by courts where there are successive registration statments was not applicable. *Id.* at 15a-16a.

In support of the finding, the Panel considered the legislative materials, which do not specifically delineate the meaning of "such security," but instead discuss "securities sold *upon a registration statement*." *Id.* at 16a (quoting H.R. Rep. No. 73-85, at 9) (emphasis in Panel Opinion). As both the reg-

istered and unregistered shares "could only be sold to the public at the time of the effectiveness of the statement" the Panel concluded that both were sold "upon a registration statement." *Id*.

The Dissent also recognized that the phrase "such security" is ambiguous but asserted that the ambiguity was resolved in *Barnes* and its progeny. *Id*. at 24a. The Dissent focused on the words "issued under" a registration statement (although no shares here, registered or unregistered, were "issued under" the registration statement) and admonished the Panel's reliance on the NYSE's rules for direct listings and its reliance on policy in making its decision. *Id*. at 24a-30a. As discussed further herein, the Dissent's arguments are flawed.

E. The Court Of Appeals Denies Rehearing And Rehearing *En Banc*

On May 2, 2022, the Ninth Circuit denied Petitioners' petitions for rehearing and rehearing *en banc*. Pet. App. at 80a-81a. The full court was advised of the petition for rehearing *en banc* and no judge requested a vote on whether to rehear the matter *en banc*. *Id*.

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant The Petition

Petitioners, the district court, and the Ninth Circuit all recognized that this case involves a matter of first impression—that is, how to construe Section 11's "such security" in the context of a direct listing where Slack's previously issued and outstanding shares became listed on the NYSE, but only a subset of those newly public shares were registered. Pet. App. at 13a, 40a, 45a. There is no compelling reason for this Court to consider this issue absent further lower court consideration of the issues.

The Panel's decision is specifically focused on direct listings and the unique circumstances presented where the same type of securities are simultaneously sold publicly and allowed to do so because of the first and only effective registration statement. *Id.* at 7a-9a, 12a-18a. In these unique circumstances, the Ninth Circuit correctly found that "Slack's unregistered shares sold in the direct listing are 'such securities' within the meaning of Section 11 because their public sale [on the NYSE] cannot occur without the only operative registration in existence. Any person who acquired shares through Slack's direct listing on the NYSE did so only because of the effectiveness of the registration statement." *Id.* at 15a.

With respect to the judge-made tracing rule, the Ninth Circuit correctly acknowledged that it arose solely to address situations involving successive registration statements, where courts have required that the person suing show that she purchased shares based upon or traceable to the alleged misleading registration statement as opposed to one that was not misleading. *Id.* In Slack's direct listing, however, all the shares, registered and unregistered, became tradeable all at once, and were purchased by plaintiff and other shareholders based upon the only effective registration statement in existence. *Id.* at 15a-16a. The Panel specifically noted that Slack's direct listing "does not present the traceability problem identified by this court in cases with successive registrations." *Id.* at 15a.

Because Section 11's reference to "such security" is unclear on its face, as all courts have found,[6] the Panel correctly considered the policy and legislative history underlying the statute to interpret its meaning. Pet App. at 16a-18a. *See Nw. Forest Res. v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1168 (9th

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[6] Courts considering the scope of Section 11 have either explicitly or implicitly acknowledged the ambiguity in the statute. *See, e.g.*, *Barnes*, 373 F.2d at 271 (acknowledging the "difficulty" in interpreting Section 11 because the "'such' has no referent"); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999) (looking to legislative history and other sources for guidance because of the statute's ambiguity); *Okla.-Texas Tr. v. SEC*, 100 F.2d 888, 892 (10th Cir. 1939) (same).

Cir. 1996) ("If a statute is ambiguous, or unclear, the legislative history can be examined to see if it expresses the intent of Congress."). The Ninth Circuit noted, as countless other courts have, that the federal securities laws were enacted to reign in the bad practices in the securities markets that were at least partially responsible for the stock market crash of 1929. Pet. App. at 16a.[7] The legislative materials do not specifically delineate the meaning of "such security," but the Conference Report pro-

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[7] *See also SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 481 n.5 (9th Cir. 1973) ("The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; . . . ."); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) ("A fundamental purpose" of the Securities Act and subsequent legislative enactments "was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (recognizing the Securities Act "was designed to provide investors with full disclosure of material information concerning public offerings"); *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941) ("The essential purpose of the [Securities Act] is to protect investors by requiring publication of certain information concerning securities before offered for sale."); *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1090 (9th Cir. 2010) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953)) ("Of paramount importance is the protection of investors through public disclosure of information necessary to make informed investment decisions.").

vides some guidance. "Fundamentally, these sections [*i.e.*, Sections 11 and 12] entitle the buyer of securities sold *upon a registration statement* including an untrue statement or omission of material fact, to sue for recovery of his purchase price, or for damages . . . ." H.R. Rep. No. 73-85, at 9; Pet. App. at 16a (emphasis in Panel Opinion).[8]

Slack filed a materially misleading Registration Statement with the SEC, and Petitioners were able to sell huge sums of shares, registered and unregistered, because of that Registration Statement. Pet. App. at 32a-36a. Not only was the Registration Statement a necessary step for Slack to be able to undertake the direct listing,[9] but the Registration Statement and follow-on Prospectus elicited investor demand for Slack's common stock. *Greenapple v. Detroit Edison Co.*, 618 F.2d 198, 210 (2d Cir. 1980) ("The objective of a prospectus is to solicit investment by the general public."). As the

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[8] Citing *Barnes*, 373 F.2d at 273, the Dissent believes that the Conference Report "plainly" refers to "registered securities." Pet. App. at 27a-28a. Were it so plain, the Conference Report could have just said "registered securities." But it did not. Moreover, *Barnes* involved two different public offerings stemming from two different registration statements and represents little more than a classic example for when tracing makes sense. The opinion's reference to "registered" securities is of no moment, as the case did not involve any questions relating to unregistered securities. In any event, the Conference Report cannot be read "plainly" to preclude standing.

[9] NYSE, § 102.01B, Footnote E; SEC Approval 2018, 83 Fed. Reg. at 5651.

Panel rightly concluded, "The connection between the purchase of the security and the registration statement is clear." Pet. App. at 16a.

Beyond the Panel's interpretation of Section 11 referencing the Conference Report, the Panel was also properly guided by the purpose of Section 11 and the harsh and unfair outcome that would result from denying plaintiff standing to proceed. *See generally SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("However well these rules [of statutory construction] may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . ."). The Panel posited that accepting Petitioners' interpretation "would create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception." Pet. App. at 16a-18a.

The Panel's decision also found support in the SEC's acknowledgment of the district court's decision. Specifically, in approving the NYSE's direct listing rule, the SEC said that it did not "expect any such tracing challenges . . . to be of such magnitude as to render the proposal inconsistent with the Act." *Id.* at 18a (citing SEC Approval 2020, 85 Fed. Reg. at 85,816 & n.112). The SEC's interpretation of its application of Rule 144, 17 CFR § 230.144, which permitted the distribution of unregistered shares in Slack's direct listing, is entitled to considerable weight. *See Hertzberg*,

191 F.3d at 1082 ("Generally, we afford deference to the Commission's interpretation of the federal securities laws as long as that interpretation is 'reasonable.'") (quoting *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997)).

The Ninth Circuit's decision was based on sound legal and factual reasoning and the holding is limited to the unique circumstances presented by the recently adopted stock exchange and SEC rules that allow for direct listings. There are in these circumstances no compelling reasons to grant the Petition.

B. The Ninth Circuit's Decision Comports With The Statutory Text

Section 5 of the Securities Act provides that, "unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to sell such security through the use or medium of any prospectus or otherwise." 15 U.S.C. § 77e. Sections 6 through 8 cover the method for registering securities, the fees, review, required information, and effectiveness of the registration statement. 15 U.S.C. §§ 77f – h.

Section 4 of the Securities Act exempts certain transactions from the provisions of Section 5, but none of the exemptions allow for the public sale of securities on a national exchange or through gener-

al distributions in interstate commerce to unaccredited investors absent a registration statement or other adequate information. 15 U.S.C. § 77d. When the NYSE passed the rule permitting investors to list shares of stock directly on the exchange, it did so only on condition of the issuance of an effective registration statement.

Section 11, which follows sequentially in the statute, provides that:

> "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" the individuals therein identified.

15 U.S.C. § 77k(a).

The focus of each of the foregoing sections in the Securities Act is the registration statement, and the requirement that there be an effective registration statement filed covering "such security," *i.e.*, the nature and type of security that is being sold, not any specific shares registered under any particular registration statement. Slack's shares could not have been publicly sold on the NYSE absent an effective registration statement.

C. The Ninth Circuit's Decision Does Not Conflict With The Decisions Of Other Circuit Courts

Petitioners' conflict argument rests on Judge Friendly's decision in *Barnes,* and those cases that have followed *Barnes'* reasoning, where tracing was at issue to ensure that a purchaser purchased such security under or based upon a particular effective registration statement, and not some other registration statement. Pet. at 15-23.

Barnes involved a Section 11 claim arising out of a secondary public offering of 200,000 common shares in the fall of 1963 when there were already 1,019,574 of the issuer's common shares outstanding from a prior offering. 373 F.2d at 270. A proposed settlement was limited to investors who had purchased shares in the 1963 offering, and two investors objected, arguing that it would be impracticable to determine whether "old or new shares [we]re being acquired . . . ." *Id.* at 272 n.1. Recognizing the ambiguity of the phrase "such security" in Section 11, Judge Friendly considered narrow and broad constructions and ultimately held that Section 11 plaintiffs must be able to "trace" their shares to the offering at issue, as opposed to a different public offering or unregistered sale. In the more than 50 years since *Barnes*, courts have required traceability *only* in cases involving multiple offerings. Given the difficulty of tracing open market purchases to a particular offering, such cases have been dismissed for lack of standing. This case involves a different scenario

and therefore is not in conflict with *Barnes* or its progeny.

The circuit decisions Petitioners cite (Pet. at 16-19) result in the same analysis and conclusion. *See Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002) (specifying that the security was issued under "*that* registration statement and not another") (emphasis in original); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951) (Section 11 claims relating to subsequent registration statement)[10]; *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003) (plaintiffs had standing because only one registration statement); *Krim v. PCOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (holding that plaintiffs lacked statutory standing to assert Section 11 claims where issuer had conducted two offerings and plaintiffs could not trace shares to particular offering at issue); *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 756 (1st Cir. 2016) (secondary offering where 166 million shares already outstanding, therefore "'obvious alternative explanation' is that they could instead have come from the pool of previously issued shares") (quoting *In re Century Aluminum*

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[10] *Fischman* is also distinguishable due to the fact that the issue was the requirement of a bond, not Section 11 standing. 188 F.2d 783. *APA Excelsior III L.P. v. Premiere Technologies, Inc.* is also distinguishable as the court there analyzed reliance, not standing, and the plaintiffs made an investment commitment prior to the registration statement. 476 F.3d 1261, 1276-77 (11th Cir. 2007) ("no registration statement was even required as to their shares").

Co. Sec. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013)); *Joseph v. Wiles*, 223 F.3d 1155, 1160 (10th Cir. 2000) ("Because MiniScribe made *only one* debenture offering, the debentures [] purchased are directly traceable to the May offering and registration statement.").

Whereas *Barnes*, *APA Excelsior*, and others refer to securities "issued under" a registration statement, not a single one of Slack's shares were "issued" in connection with the direct listing. All the shares that were the subject of the direct listing had been previously issued by Slack to the selling stockholders at various points in time. Pet. App. at 8a, 33a-34a, 45a-46a. Those stockholders (not Slack), held many, but not all, of their shares long enough so that those shares could be sold under Rule 144 without being registered. *Id.* That said, *for any of the shares to become publicly tradeable on the NYSE* through the direct listing, Slack had to file a registration statement with the SEC, as the Panel correctly noted. *Id.* at 14a-16a.

Further, several of the opinions Petitioners cite contain supporting language for the Ninth Circuit's decision. For example, in *Rosenzweig*, the Fifth Circuit determined that the district court had erred in finding a lack of standing for aftermarket purchasers "because there was only *one* offering . . . all the plaintiffs' stock is traceable to the challenged registration statement." 332 F.3d at 873 (emphasis in original). In making this determination, the Fifth Circuit cited to a House Report on the Securities Act, also cited to by this Court in

Gustafson, which stated: "'The bill affects only new offerings of securities. . . . It does not affect the ordinary redistribution of securities *unless such redistribution takes on the characteristics of a new offering*.'" *Id.* at 872 (citing to *Gustafson v. Alloyd Co.*, 513 U.S. 561, 590 (1995), and quoting H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1993)).

D. The Ninth Circuit's Decision Is Consistent With This Court's Previous Rulings

The Ninth Circuit's ruling does not conflict with this Court's decisions regarding the Securities Act. Pet. at 23-25. *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), is easily distinguishable on the facts and specific questions at issue here. The two issues there were: (1) whether purchasers of registered securities who allege they were defrauded by misrepresentations in a registration statement may maintain an action under Section 10(b) of the Exchange Act notwithstanding the express remedy under Section 11, and (2) the appropriate burden of proof on such Section 10(b) claims. The Supreme Court was not interpreting the meaning of Section 11's "such security"—tellingly, none of the classic tracing cases relied on *Herman & MacLean* to interpret the phrase either.

Likewise, the facts and issues presented in *Gustafson*, 513 U.S. 561, do not relate to those at hand. In *Gustafson*, this Court resolved a long-standing split in the circuits by holding that Section 12 does not apply to a private contract for a secondary market sale of securities. This Court

concluded that, "the word 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." *Gustafson*, 513 U.S. at 583-84. In relying on *Gustafson* to support their argument, Petitioners are in reality asking this Court to create a new rule requiring plaintiffs to establish the traceability requirement pursuant to Section 12(a)(2) which is inconsistent with Section 12(a)(2)'s plain language. *See* 15 U.S.C. § 77*l*; Pet. App. at 89a-90a.

Petitioners' reliance on the term "registered security" in *Herman & MacLean* is also misplaced. Pet. at 24. Not only was this Court *not* ruling on how to interpret Section 11, but Petitioners ignore this Court's clarifying language following the term which states that "[i]f a plaintiff purchased *a security issued pursuant to a registration statement*" then liability is absolute under Section 11 if plaintiff can show a material misstatement or omission. *Herman & MacLean,* 459 U.S. at 382 (emphasis added); *see also Gustafson*, 513 U.S. at 580-81 ("'[f]undamentally, [Sections 11 and 12] entitle the buyer of securities sold upon a registration statement . . . to sue for recovery'") (quoting H.R. Rep. 85, 73d Cong., 1st Sess. 5 (1933)).

The Ninth Circuit's decision also comports with the purpose and policy of the Securities Act, as recognized by this Court in *Herman & MacLean*, in that in enacting the Securities Act and Exchange Act, Congress' intention was for the acts to have "broad remedial purpose[]." *Cf. Herman &*

MacLean, 459 U.S. at 384-87 and Pet. App. at 16a-18a.

E. The Ninth Circuit Decision Does Not Have Far-Reaching Effects

Petitioners overstate the consequences and reach of the Ninth Circuit's decision. Pet. at 19-23, 25-32. First, the Ninth Circuit's decision is limited to circumstances where an offering includes only *one* registration statement *and* the *simultaneous* release of registered and unregistered shares, contrary to Petitioners' arguments otherwise. Pet. at 26-28. Petitioners' argument that the logic of the Ninth Circuit would now be applicable to instances such as the one in *Krim* is unfounded. Pet. at 20-22, 26. In *Krim*, registered and unregistered shares were *not* released simultaneously. 402 F.3d at 492. Petitioners focus solely on the Ninth Circuit's decision pointing to the fact that the shares were only available due to a registration statement filing (Pet. at 19-22, 26-27), ignoring that the Ninth Circuit also included in its finding that here there is a difference from a traditional IPO because the shares were released at the same time. *See, e.g.*, Pet. App. at 13a (describing the "issue before the court" as to Section 11 standing where "registered and unregistered securities are offered to the public *at the same time*, based on the existence of that one registration statement") (emphasis added); *Id.* at 14a-15a (distinguishing Slack's direct listing from those where unregistered shares are released after a lock-up period).

Second, Petitioners' arguments that the Ninth Circuit decision gives the statutory text a different meaning based on the facts[11] and that Congress or the SEC should be the ones to resolve this issue is unsound. Pet. at 27-28. As recognized by the district court, the Ninth Circuit, and by this Court on prior occasions, Congress enacted the Securities Act to protect the investing public against the issuance of even innocent false and misleading disclosures in connection with the dissemination of securities to the public. *See, e.g.*, *Platforms Wireless*, 617 F.3d at 1085 ("The registration requirement . . . was designed to be a principal statutory tool for protecting the public."); S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933) ("The purpose of this bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be

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[11] Petitioners' and the Dissent's argument that Section 11 should not be interpreted differently because of new developments in the marketplace rings hollow. Pet. at 23 (citing Pet. App. at 28a). Not only was the Dissent's reliance on *Barnes* misplaced in stating so as the case did not involve any questions relating to unregistered securities, the Panel's decision did not interpret Section 11 "differently," as explained herein. The Conference Report cannot be read "plainly" to preclude standing. *See also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (courts may look beyond plain meaning of unambiguous statute when it would lead to "absurd or futile results," or an "unreasonable one" inconsistent with the statute's policy); *Transamerica Mortg. Advisors (TAMA) v. Lewis*, 444 U.S. 11, 20 (1979) ("Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent.").

offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation.").

And, to be clear, this Court has admonished that "remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). This Court "itself has construed securities law provisions 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Pinter v. Dahl,* 486 U.S. 622, 653 (1988) (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)). The Ninth Circuit has done exactly that here. Congress did not use the words "registered security" but "such security" when drafting the Securities Act. Congress' broad language encompasses these circumstances, and the Securities Act's remedial purposes and the statutory text directly align with the Ninth Circuit's holding.

Third, the Ninth Circuit's decision in no way upsets the balance between the Securities Act and the Exchange Act. Pet. at 28-30. "[I]t is hardly a novel proposition that the 1934 Act and the 1933 Act 'prohibit some of the same conduct.'" *Herman & MacLean*, 459 U.S. at 383 (quoting *United States v. Naftalin*, 441 U.S. 768, 778 (1979)). The Ninth Circuit's decision does not "eviscerate the requirements for recovery" under the Exchange Act. Pet. at 28 (citation omitted). Petitioners appear to be asserting that no investor would ever sue under the Exchange Act if they have standing to sue under

the Securities Act. *Id*. Such assertion ignores that numerous investors have done so, asserting both Exchange Act claims and Securities Act claims for the same misstatements in a registration statement. This very issue was the center of this Court's decision in *Herman & MacLean* where an investor *only* sued under the Exchange Act although the conduct was actionable under Section 11 as well. *Herman & MacLean*, 459 U.S. at 381-87.

Petitioners' claim that "no rational issuer would be 'incentivized' to engage in securities fraud" because they could still be liable pursuant to the Exchange Act is non-sensical. Pet. at 29. As Petitioners themselves point out, Section 10 of the Exchange Act requires a heavier burden than claims under the Securities Act, requiring proof of scienter. Pet. at 28. Therefore, issuers could be incentivized to engage in securities fraud if they knew that they would be free from the strict liability imposed by Section 11 in lieu of the more stringent standards required by Section 10.[12]

As stated above, the Ninth Circuit's ruling is narrow and fact-based. It does not "dramatically" expand opportunities for relief under the Securities Act. Pet. at 29-30. Notably, there have been very few companies to take advantage of the new direct

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[12] The fact that Slack itself raised no capital is a *non sequitur*. Pet. at 29. The remaining defendants all profited through the public sale of their shares and now issuers can raise capital through direct listings. Pet. App. at 17a n.6, 32a.

listing rule.[13] And, plaintiffs must still prove that an issuer made a material misstatement or omission. 15 U.S.C. § 77k(a); Pet. App. at 82a-83a. Moreover, the mere fact that a plaintiff has standing does not in any way diminish the number of defenses available to defendants, including the specific due diligence defense enumerated in Section 11 itself. 15 U.S.C. § 77k(e); Pet. App. at 86a-87a. Quite simply, there is no risk of a negative impact on private securities litigation or dramatic change.

Fourth, the Panel's decision hardly discourages innovation in the capital markets. Pet. at 30-31. The Ninth Circuit's order simply ensures compliance with the existing statutory scheme adopted nearly a century ago, which will not be the death knell of direct listings and other potentially novel methods of going public. Indeed, 2021 was a record year for IPOs.[14] And, although IPOs have slowed in 2022, the slowdown has not been attributed to the Ninth Circuit decision. *Id.*

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[13] Jay R. Ritter, *Initial Public Offerings: Direct Listings Through May 19, 2022*, (May 19, 2022), https://site.warrington.ufl.edu/ritter/files/Direct-Listings.pdf.

[14] *See* PwC, Q3 2022 Capital Markets Watch, https://www.pwc.com/us/en/services/consulting/deals/capital-markets-watch-quarterly.html; *see also* Press Release, EY, YTD 2022 saw dramatic slowdown in global IPO activity from a record year in 2021 (June 30, 2022 | London, GB), https://www.ey.com/en_gl/news/2022/06/ytd-2022-saw-dramatic-slowdown-in-global-ipo-activity-from-a-record-year-in-2021 (similar).

Petitioners' final argument, a re-packaging of all the above, that an element of uncertainty has been introduced with the Ninth Circuit's decision (Pet. at 31-32), is incorrect for all of the reasons above. For these reasons as well, the Petition fails to present any compelling reason for this Court to grant certiorari review.

F. This Case Is Not An Ideal Vehicle For Review Of Securities Act Standing

Contrary to Petitioners' assertion, this case does not "present an ideal vehicle" for resolution of whether "plaintiffs suing under Sections 11 and 12 need to prove they bought registered shares." Pet. at 32-33. There is no conflict created by the Ninth Circuit's decision as explained herein. There are no other district or circuit court cases analyzing the applicable statutory scheme and relevant SEC rules governing exempt transactions and allowing for direct listings. The Court should not wade into this issue of first impression regarding a newly developed SEC rule without the benefit of further analysis by other district and circuit courts.

Further, plaintiffs will not now have a "compelling reason" to file Securities Act cases in the Ninth Circuit. Pet. at 23, 33. The Ninth Circuit certainly did not overturn the tracing requirement when there are multiple registration statements, instead stating that its ruling was applicable to the situation at hand. Additionally, forum selection is not as simple as Petitioners claim. Pet. at 33. Plaintiffs cannot "pick whatever forum they like."

Id. As the multitude of orders transferring securities class actions show, securities actions are most often brought and maintained in the district where the company is headquartered or where the plaintiff resides. *See, e.g.*, *City of N. Miami Beach Police Officers' & Firefighters' Ret. Plan v. Nat'l Gen. Holdings Corp.*, No. SACV 19-06468 AG (KESx), 2019 U.S. Dist. LEXIS 227121, at *6-7 (C.D. Cal. Nov. 18, 2019) (locus of operative facts is where allegedly false statements originated, *i.e.*, the company's headquarters); *In re Hanger Orthopedic Grp., Inc.*, 418 F. Supp. 2d 164 (E.D.N.Y. 2006) (transferring action to Maryland where company's headquarters are located as plaintiff did not reside in chosen forum).

CONCLUSION

This Court should deny the Petition. The capital markets are not suffering, and the holding below is limited to direct listings and those few instances where registered and unregistered shares are simultaneously sold to the public upon the one and only effective registration statement. Plaintiff bought Slack shares and suffered substantial losses based upon and pursuant to the only effective registration statement on file. The district court and the Ninth Circuit correctly found that the tracing requirements recognized in *Barnes* and its progeny did not apply in these circumstances. The Ninth Circuit's decision addressed a question of first impression, is sound, and does not provide any compelling reason for this Court to grant the Petition.

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Respectfully submitted,

BRAGAR EAGEL & SQUIRE, P.C.

Lawrence P. Eagel
Counsel of Record
810 Seventh Avenue, Suite 620
New York, New York 10019
212-308-5858

and

Melissa A. Fortunato
Marion C. Passmore
BRAGAR EAGEL & SQUIRE, P.C.
580 California Street, Suite 1200
San Francisco, California 94104
415-568-2124

Attorneys for Respondent