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

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2 of the rules of this Court, the Cato Institute ("Cato") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in *Pirani* v. *Slack Technologies, Inc.*, 13 F.4th 940 (9th Cir. 2021). Counsel of record for all parties received timely notice of Cato's intent to file the attached brief as required by Rule 37.2(a). Counsel for Plaintiff-Respondent withheld consent, so Cato is filing this motion for leave to file the attached brief *amicus curiae* pursuant to Rule 37.2(b).

In this case, the Ninth Circuit broke with decades of securities-law precedent and ruled that a plaintiff may sue under Section 11 of the Securities Act of 1933 with respect to both shares registered for sale under the challenged registration statement and *unregistered shares* (*i.e.*, shares not registered for sale under the registration statement but sold pursuant to exemptions from registration) because a registration statement "makes it possible to sell both registered and unregistered shares." Pet. App. 15a. Cato's brief *amicus curiae* will assist the Court in understanding how the Ninth Circuit's misinterpretation of Section 11 disincentivizes the direct listing method that Slack used to go public here. Direct listings—an alternative to traditional initial public offerings—present the potential for significant economic growth and wealth creation. But as Cato's brief *amicus curiae* explains, the Ninth Circuit's misunderstanding of Section 11 will hinder innovation in public offerings, including by undermining the unique benefits that direct listings offer to companies, their existing shareholders, and the economy as a whole.

Accordingly, Cato respectfully request that the Court grant this motion for leave to file a brief *amicus curiae*.

Respectfully submitted.

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BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 and dedicat-

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than Cato, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of Cato's intent to file this brief at least 10 days prior to its due date. Sup. Ct. R. 37.2(a). Counsel for Plaintiff-Respondent withheld consent, so Cato has filed a motion for leave to file this *amicus curiae* brief. *Id.* 37.2(b).

ed to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Monetary and Financial Alternatives focuses on identifying, studying, and promoting alternatives to centralized, bureaucratic, and discretionary financial regulatory systems. Toward those ends, Cato publishes books and studies, conducts conferences, and files *amicus* briefs.

This case interests Cato because the Ninth Circuit's departure from decades of securities-law precedents expands standing to sue under Section 11 of the Securities Act of 1933 (the "Securities Act") beyond its intended boundaries, in the process disincentivizing an alternative to traditional initial public offerings ("IPOs") that shows the potential for economic growth and wealth creation. Because of Cato's commitment to free and prosperous markets, Cato respectfully submits that the Court should grant the petition for a writ of certiorari and reverse the judgment of the Ninth Circuit.

SUMMARY OF ARGUMENT

In *Barnes* v. *Osofsky*, Judge Friendly wrote that Section 11 of the Securities Act—which imposes liability for material misstatements or omissions in connection with a registered offering on issuers, directors, officers, underwriters, and auditors—was limited to shares issued under the registration statement containing the alleged misstatement or omission. 373 F.2d 269 (2d Cir. 1967). For over fifty years, courts have faithfully applied that principle, supplying predictability to securities markets. But in a 2-1 decision, the Ninth Circuit upended this rule in favor of an expansive reading of Section 11 that usurps Congress's exclusive role in enacting securities laws and significantly alters the

calculus companies face when deciding whether to go public.

Congress crafted the Securities Act with a delicate balance between requiring disclosure to reduce fraud and misinformation without pricing too many transactions out of the marketplace. Section 11 of the Securities Act is an important aspect of this carefully balanced liability scheme. Because Section 11 provides for strict liability that penalizes even inadvertent mistakes in a registration statement, Congress has limited the class of plaintiffs who can sue under Section 11 to shareholders who purchased shares that were issued under the registration statement containing the alleged misstatement or omission. This tracing requirement is "integral to Congress's decision to relax the liability requirements for a Section 11 claim." Cunningham et al., *Litigating Section 11's Tracing Requirement: A Practitioner's View of a Powerful Defense* 2, Bloomberg Law: Professional Perspective (2019), https://tinyurl.com/7b5tubkf.

But the Ninth Circuit's holding upsets Congress's balance of interests. In breaking with decades of precedent, the Ninth Circuit held that a plaintiff may sue under Section 11 with respect to both shares registered for sale under the challenged registration statement and *unregistered shares* (*i.e.*, shares not registered for sale under the registration statement but sold pursuant to exemptions from registration) because a registration statement "makes it possible to sell both registered and unregistered shares." Pet. App. 14a-15a. But the legislative history of Section 11 makes clear that it was not intended to cover such a broad class of purchasers. Indeed, federal courts have repeatedly rejected the policy concerns driving the Ninth Circuit's decision, holding instead that it is up to lawmakers and regulators,

weighing the political and economic costs and benefits, to alter Section 11 should they find that its balance of interests should be reconsidered.

The Ninth Circuit's policy-driven decision also ignores the policy *benefits* of public offerings for entrepreneurs, start-up companies, investors, and the economy as a whole. While going public benefits companies by providing increased capital and benefits investors by providing increased transparency about the companies they invest in, the Ninth Circuit's new rule has the potential to deter companies from ever going public in light of the costs associated with increased Section 11 liability and the distraction of management's time from the company's business while defending Section 11 claims. Moreover, the Ninth Circuit's novel interpretation of Section 11 will hinder innovation in public offerings, including the direct listing method that Slack used to go public here. Direct listings offer unique benefits to companies and their existing shareholders by allowing existing shareholders to sell their shares on a public stock exchange without the delay and overhead associated with a traditional IPO. The Ninth Circuit's holding, however, raises the costs of pursuing a direct listing, as any costs saved from avoiding underwriters and other IPO expenses could be replaced (or even overtaken) by the litigation costs of extending Section 11 standing to all post-offering purchasers.

Compared to Congress, the SEC, and the stock exchanges, courts are ill-equipped to determine the proper interplay between regulations and economic incentive in the context of Section 11. If a change to the Securities Act's comprehensive liability scheme is warranted, Congress should be responsible for determining the scope of Section 11 liability. Accordingly, this Court's review is warranted to correct the Ninth

Circuit's error, resolve the resulting circuit split, and ensure that Section 11 stays within the boundaries that Congress intended.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION THREATENS PUBLIC OFFERINGS AND WILL HAVE BROAD AND ADVERSE CONSEQUENCES FOR THE U.S. ECONOMY

A. Expanding Section 11's Reach to Both Registered and Unregistered Shares Will Hinder Public Offerings

The Ninth Circuit's departure from decades of securities-law precedent threatens to expand Section 11's jurisdiction beyond its intended boundaries and thwart the economic potential from innovation in the public offering space. But the potential damage resulting from the Ninth Circuit's decision is not limited to the present case, or even to direct listings. Rather, because the Ninth Circuit held that Section 11 applies when a registration statement "makes it possible to sell both registered and unregistered shares to the public," this holding could be extended to traditional IPOs in addition to direct listings. Pet. App. 14a-15a; *see also* Pet. App. 15a ("Any person who acquired Slack shares through its direct listing could do so only because of the effectiveness of its registration statement.").

In a traditional IPO, underwriters generally require that company insiders and other pre-IPO shareholders who already own shares agree to a "lockup" period—typically a period of 180 days after the IPO—during which they are not permitted to sell their shares. But because an initial registration statement is filed with the SEC to start the process of the public offering (*see* SEC Form S-1), purchasers could contend

that the only reason they were able to purchase *any* shares on a public stock exchange—including unregistered shares sold after the IPO lockup period expiries—was "because of the effectiveness of [the earlier] registration statement." Pet. App. 15a. Under the Ninth Circuit's logic, those unregistered shares would therefore fall within the scope of Section 11, even though the shares were not sold pursuant to a registration statement but were instead sold pursuant to exemptions from registration.

The Ninth Circuit's new rule eviscerates the current legal landscape where the end of the lockup period cuts off Section 11 liability and thus has the potential to deter companies from ever going public—even through a traditional IPO—for fear of the costs associated with increased Section 11 liability and the distraction of management's time from the company's business while defending Section 11 claims. And because public offerings in the United States are rarely, if ever, limited to purchasers in select states, the Ninth Circuit's ruling will govern nearly all issuers seeking to go public henceforth; plaintiffs will file suit in the Ninth Circuit to avoid tracing requirements in other circuits. As such, the higher liability promised by the Ninth Circuit's decision will cause companies to lose out on all the benefits of going public. *See* Westenberg, *Initial Public Offerings: A Practical Guide to Going Public* § 1:2.1 (2d ed. 2021). Public market investors will also lose the opportunity to own part of, and profit from the success of, a company, not to mention the benefits of increased transparency and access to financial information that come with a publicly traded company.

But even if the Ninth Circuit disagreed about the various economic benefits of companies going public, it is for Congress, the SEC, and the stock exchanges—not

the courts—to determine the proper interplay between regulations and economic incentive in the context of Section 11. In holding that unregistered shares also qualified as "such securit[ies]" under Section 11 because those shares "were sold to the public when 'the registration statement … became effective,'" the Ninth Circuit panel majority relied on a policy rationale—that "requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement" would "create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception." Pet. App. 18a; *see also* Pet. App. 28a (Miller, J., dissenting) ("What appears to be driving today's decision is not the text or history of section 11 but instead the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing.").

This policy-driven decision, however, ignores the fact that the difficulty in determining whether shares were issued under a particular registration statement is not a new issue. Pet. App. 28a (Miller, J., dissenting) (explaining that "the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing … is neither new nor particularly concerning"). Indeed, as Judge Miller noted in his dissent, "[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.'" *Id.* But the Second Circuit 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. *See Barnes* v. *Osofsky*, 373 F.2d 269, 273 (2d Cir. 1967). In following

Barnes, other circuits have recognized that it is not the role of courts to rewrite the language of Section 11 simply because new developments in the marketplace, including new types of offerings, might make it harder to determine whether a security was registered under a particular registration statement. As the Fifth Circuit put it in *Krim* v. *pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005):

> [When] Congress enacted the Securities Act of 1933 it was not confronted with the widespread practice of holding stock in street name that Appellants describe as an impediment … to invoking Section 11. That present market realities, given the fungibility of stock held in street name, may render Section 11 ineffective as a practical matter in some aftermarket scenarios is an issue properly addressed by Congress. It is not within our purview to rewrite the statute to take account of changed conditions.

Id. at 498. In short, it is up to lawmakers and regulators, weighing the political and economic costs and benefits, to alter Section 11 should they find that its balance of interests is no longer desirable. Judges are not a part of the equation.

B. The Ninth Circuit's New Rule Will Disincentivize Innovation in Public Offerings

The Ninth Circuit's novel interpretation of Section 11 will also hinder innovation in public offerings, including the direct listing method that Slack used to go public here. Alternative offering methods benefit investors in the broader U.S. economy, particularly in an age when more and more private companies look at the regulatory landscape and choose to remain private for longer. *See The IPO Is Being Reinvented*, The

Economist (Aug. 20, 2020), https://econ.st/3jzFmn7. By bringing more companies to the public markets, direct listings give investors the opportunity to more easily own part of a company and obtain enhanced access to information through mandatory disclosures. But the increased Section 11 liability and associated costs promised by the Ninth Circuit's holding will disincentivize private companies from pursuing innovative public offering methods that benefit entrepreneurs, startup companies, investors, and the economy as a whole.

Though an IPO is the traditional method used by private companies to go public, alternatives to the conventional IPO may better serve a diversity of issuers, including niche issuers or so-called "unicorn" tech startups (*i.e.*, highly valued private startups like Spotify, Slack, Coinbase, and Warby Parker) whose capital structure or objectives when going public may better align with a different offering type. Indeed, a variety of methods for public listing is consistent with the Securities Act, which was not designed to limit issuers to one offering type. To the contrary, the Securities Act's pro-disclosure approach assumes any number of offering types, simply asking issuers and their representatives be honest salesmen.

The direct listing is one such alternative means of going public that has unique benefits for companies, their existing shareholders, and the economy at large. In direct listings, companies generally do not issue any new shares. *See* Farrell, *Direct Listings Have Paid Off for Investors So Far*, Wall St. J. (Aug. 30, 2021) ("In general, companies that choose this route tend to be in solid financial shape because they don't need to raise capital through a traditional IPO."), https://tinyurl.com/muu4crjj. Instead, the issuer files a registration statement with the SEC, and shares registered for sale

under the registration statement are immediately tradeable on a stock exchange and shares not registered for sale under the registration statement become tradeable pursuant to exemptions from registration. "In a direct listing, some shares are sold under the registration statement while others are not." Nickerson, *The Underlying Underwriter: An Analysis of the Spotify Direct Listing*, 86 U. Chi. L. Rev. 985, 1006-1007 (2019).

Direct listings offer out-of-the-garage-era employees and early investors in startup companies the liquidity of a public market and enable them to sell their shares at a market price, often with less red tape and overhead along the way than a traditional IPO. Indeed, one scholar noted that, "the primary motivation for a direct listing" is not capital-raising but rather "liquidity" for shareholders who seek "the ability to sell stock for cash *easily*." Horton, *Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failures?*, 72 SMU L. Rev. 177, 188 (2019). Unlike the traditional IPO, which usually features a 180-day lockup period for shares held by insiders and other pre-IPO shareholders, direct listings provide existing shareholders—including early employees and investors in startup companies—the opportunity to more easily sell their shares or convert their stock-option shares to cash. Shareholders also benefit in a direct listing by selling their shares at a market price, rather than at the initial price to the public set by underwriters in an IPO, which is often less than the market price after the stock begins public trading. *See A Current Guide to Direct Listings* 2, Gibson Dunn (Jan. 8, 2021), https://tinyurl.com/476mxvan. Direct listings thus promote ingenuity and innovation by offering a company's early-stage employees and investors a

more streamlined opportunity to reap a greater return on their investment than a traditional IPO.

Companies have likewise found direct listings to be a valuable means of going public. Direct listings eschew the traditional underwriting process, allowing companies to avoid the high transaction costs associated with engaging an underwriting syndicate to conduct an IPO. *See A Current Guide to Direct Listings* 3, *supra*; Kecskés, *Spotify's Direct Listing in the U.S. and Lessons from the U.K.*, Columbia Law School: Blue Sky Blog (Mar. 1, 2018) ("Direct listings look promising, especially if they lower the cost of going public compared with staying private or selling to other firms."), https://bit.ly/2Thl2w9; Farrell, *Direct Listings Have Paid Off for Investors So Far*, *supra* ("In typical big IPOs, a dozen banks or more can share fees of $100 million. In direct listings, companies still pay fees—but slimmer ones, often in the tens of millions for similar size deals."). Direct listings thus provide companies with a cost-effective avenue to go public when their objective is providing employees and early investors with access to the public markets as opposed to raising capital. Without the direct listing, Slack, which did not need to raise capital, may have concluded that the transaction costs of a traditional IPO were too high to make going public worthwhile. *See* Pet. 30.

Moreover, direct listings avoid the underwriter's role in setting the price at which the securities will be traded. *See A Current Guide to Direct Listings* 2, *supra*. Instead, "the market sets the price at the very first instance"—avoiding issuers' "leaving money on the table" in a mispriced underwritten offering. Grundfest, *What Are Direct Listings, How Do They Work, and Why Do They Matter?*, Stanford Law School Blog (Jan. 10, 2020), https://stanford.io/3jE9QnW. Companies that have gone

public through direct listings have "on average, outperformed the S&P 500 and a key broader index for initial public offerings during the same period." Farrell, *Direct Listings Have Paid Off for Investors So Far*, *supra*. Attracted by these attributes, a number of companies, particularly in the tech sector, have taken this route since 2018. *See* Schulp, *IPOs, SPACs, and Direct Listings, Oh My!*, Real Clear Policy (May 21, 2021), https://bit.ly/2YuR9yC.

Direct listings also may allow issuers to later raise capital on "favorable terms" because, while IPOs often leave capital on the table, suffering from roughly 20% underpricing, firms whose stock is already publicly traded suffer "essentially negligible" underpricing when they seek to later raise capital. Kecskés, *Spotify's Direct Listing in the U.S. and Lessons from the U.K.*, *supra*. Combined with the fact that direct listings avoid the costs of underwriter participation, it quickly becomes clear why many industry insiders view them with such promise. *See, e.g.*, Brewer, *Analysis: Private Equity Eyes SPACs, Direct Listings Over IPO*, Bloomberg Law (Nov. 4, 2019) ("Meanwhile, turmoil at the top of the IPO market had fingers pointing all around: VC and private equity-backed unicorns going public are overvalued and overly mature, investment banks are mispricing shares and charging excessive fees, and IPO investors are expecting big post-IPO price pops. The IPO model is breaking down—and some in private equity see direct listings as a possible solution."), https://bit.ly/3e1fu2c; *see also* Gonzalez, *Spotify's CEO: The Traditional IPO Process Hasn't Evolved in Decades—That's 'Moronic,'* Inc. (June 20, 2019), https://bit.ly/30MzKPV.

In addition to the benefits described above, the availability of direct listings has also begun to spur

innovation in traditional IPOs, which have long been governed by custom and tradition that may not serve all companies well. *See, e.g.*, Zanki, *IPO Lockup Periods Begin to Loosen Amid Market Pressure*, Law360 (Sept. 17, 2021), https://bit.ly/30sLHx7; Brewer, *Analysis: Innovation May Make IPO 'Price Pops' Fizzle Out*, Bloomberg Law (Apr. 20, 2021), https://bit.ly/3omZxsU. A halt in direct listings, which the Ninth Circuit's decision threatens, may slow or reverse changes to the traditional IPO process that are being brought about by this competition in listing alternatives. As such, rather than supporting economic growth and bolstering startup businesses, the Ninth Circuit's judgment has the potential to depress early-stage investment and its associated economic benefits.

Maintaining the existing regulatory scheme, including the liability limits built into Section 11, is crucial to supporting the direct listing as a viable alternative means of going public. But the Ninth Circuit's holding that shares not registered as part of a direct listing fall under Section 11's ambit raises the costs of pursuing a direct listing, which may force some companies to remain private. Indeed, any costs saved from avoiding underwriters and other IPO expenses could be replaced (or even overtaken) by the litigation costs of extending Section 11 standing to all post-offering purchasers.

Finally, contrary to the Ninth Circuit's assertion that "interpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability," Pet. App. 17a, it is not a foregone conclusion that tracing is impossible in a direct listing. New technologies (and novel application of existing technologies) might well make it easier for claimants to determine whether the shares they purchased were registered for sale in direct listings or

were sold pursuant to exemptions from registration. Blockchain, for example, may provide such a means, allowing ownership of a particular share to be traced from its issuance to its current holder. *See generally* Belcher, *Tracing the Invisible: Section 11's Tracing Requirement and Blockchain*, 16 Colo. Tech. L.J. 145 (2018); *see also* Vanyo & Rotenberg, *Blockchain Technology May Enable Tracing in Securities Act Litigation*, Litigation Advisory, Katten Muchin Rosenman LLP (Mar. 22, 2018) ("Tracing, now virtually impossible, might be accomplished by the click of a button or the scan of a bar code on a stock certificate."), https://bit.ly/35GrMcM. These innovations are for Congress and regulators to evaluate. It is not for the courts to intervene and make a policy-based adjustment to settled law when an offering's design happens to make tracing difficult or infeasible.

II. THE NINTH CIRCUIT'S JUDGMENT IS CONTRARY TO THE LEGISLATIVE HISTORY AND CONTEXT OF SECTION 11

The Ninth Circuit's holding also disregards Section 11's legislative history and enactment context. Indeed, judicially altering Section 11's coverage undermines the Securities Act's disclosure regime and underlying philosophy of mandatory disclosure.

While the Ninth Circuit seemed to believe that expanding the meaning of "such security" somehow *fulfills* the Securities Act's regulatory function, that holding is at odds with the Securities Act's carefully balanced liability scheme and, specifically, the limited availability of Section 11's strict liability remedy. Conversely, Judge Friendly's widely adopted holding in *Barnes* v. *Osofsky*, that a claimant's shares must have been issued under the registration statement containing the alleged misstatement or omission, ensures that

Section 11 is applied as Congress intended. In *Barnes*, Judge Friendly's analysis looked to a legislative history replete with considered discussion of the limits of disclosure and found that applying the "broader reading" of Section 11—*i.e.*, "acquiring a security of the same nature as that issued pursuant to the registration statement"—regardless of whether or not they could trace the purchase of their shares to the registration statement, "would be inconsistent with the over-all statutory scheme." 373 F.2d at 271-272. The one mention in the Congressional Record of the intent to apply Section 11 "regardless of whether [purchasers] bought their securities at the time of the original offer or at some later date," does not reduce or remove the requirement that a claimant prove their shares belonged to the closed set offered in the registration statement; it simply extends standing to secondary and tertiary purchasers of the same set of securities. *See id.* at 272-273 (citations omitted) (reasoning it "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"). Judge Friendly was faithful to the common understanding at its passage that the Securities Act should require disclosure necessary to eliminate (or greatly reduce) fraudulent offerings, without then punishing honest issuers by imposing potentially chilling costs in all circumstances.

Courts considering Section 11 have widely followed Judge Friendly's interpretation, despite plaintiffs' claims of difficulty in tracing their securities to a particular registration statement. *See generally* Sale, *Disappearing Without a Trace, Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 Wash. L. Rev. 429 (2000) (survey of post-*Barnes* judicial treatment of the tracing

requirement); *see also, e.g.*, *In re ARIAD Pharms.*, 842 F.3d 744, 755 (1st Cir. 2016); *Krim*, 402 F.3d at 495-496. One district court offered perhaps the best explanation for Congress's prerogative here:

> [R]igid application of the tracing requirement is a product of Congress['s] decision to balance the low-burden substantive proof [with a] high-burden standing requirement, and courts should not abrogate the congressional intent by expanding the 'virtually absolute' liability to claims of purchasers whose securities cannot be traced.

In re FleetBoston Fin. Corp. Sec. Litig., 253 F.R.D. 315, 347 (D.N.J. 2008); *see also* Cunningham, *Litigating Section 11's Tracing Requirement* 2, *supra* (citing *FleetBoston*, adding "[the] tracing requirement is integral to Congress's decision to relax the liability requirements for a Section 11 claim" because the provision "does not require … [proof of] scienter or loss causation" or "proof of reliance"). In other words, Congress intended Section 11 to promote truthfulness to the extent necessary to achieve competitive fairness and preserved the role of organic market forces beyond that point.

Congressional hearings ahead of the Securities Act's passage reveal Congress's effort to ensure substantive disclosure without pricing too many transactions out of the marketplace. *See, e.g.*, *Federal Securities Act, Hearing Before the Committee on Interstate and Foreign Commerce on H.R. 4314*, 73d Cong. 140 (1933) (former FTC Commissioner Huston Thompson rejecting the idea of requiring FTC approval for all offerings, warning that doing so "would slow up the business"). Section 11 is integral to the Security Act's design, which emphasized an "underlying policy of

disclosure" and took "care[] not to give any appearance that the government either approved or guaranteed the newly issued securities." Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 Ohio St. L.J. 329, 342-343 (1988).

In terms of contemporaneous commentary on the passage of Section 11, eminent lawyer James Landis (who would serve as the second chairman of the SEC) spoke of Section 11 liability strictly in terms of the registration statement, and not in any broader reference to extra-textual fairness. *See generally* James M. Landis, *Speech Before the New York State Society of Certified Public Accountants* (Oct. 30, 1933), https://bit.ly/2I1q4KK. Landis was not alone in viewing Section 11 exclusively through the lens of an anchoring registration statement. During pre-enactment hearings in the House, it was observed that Section 11 would "accord a remedy to all purchasers who may reasonably be affected by any statements in the registration statement," but that "fundamentally, [Section 11] entitle[s] the buyer of securities sold upon a registration statement including an untrue statement or omission of a material fact, to sue for recovery of his purchase price, or for damages." H.R. Rep. No. 73-85, at 9, 22 (1933); *see also Barnes*, 373 F.2d at 273 (reasoning that these statements "can be read to relate only to the extension of liability to open-market purchasers of the *registered shares*" (emphasis added)).

More than sixty years later, Justice Ginsburg, in considering Section 11's legislative history, noted that "[t]he dominant point made by the [House] Report, moreover, is that the civil liability sections are exacting." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 600 n.4 (1995) (Ginsburg, J., dissenting); *see also* Turnquist,

Pleading Under Section 11 of the Securities Act of 1933, 98 Mich. L. Rev. 2395, 2405 n.63 (2000) (citing H.R. Rep. No. 73-85, at 10, where a participant remarked that "[t]he connection between the statements made and the purchase of a security is clear, and, for this reason, it is the essence of fairness to insist upon the assumption of responsibility for the making of these statements").

Moreover, even if the mechanics of a particular public offering type make it harder to sue under Section 11, both registered and unregistered shares are still within the scope of the federal securities laws. Where a purchased security cannot be traced to the relevant registration statement, Section 10(b) of the Securities Exchange Act of 1934—which is not tied to the registration statement—casts a catch-all net against intentional misstatements or omissions, and Section 11 can still maintain the disclosure-efficiency balance despite its general unavailability to claimants who cannot trace their shares. *See* Curnin & Ford, *The Critical Issue of Standing Under Section 11 of the Securities Act of 1933*, 6 Fordham J. Corp. & Fin. L. 155, 193 (2001) ("[T]here is no justification rooted in necessity, fairness or common sense to extend the protections of Section 11, which regulate disclosure in a registration statement, to purchasers in the secondary market who have a remedy under Section 10(b) and who never saw a registration statement."). If a change to this comprehensive liability scheme is warranted, Congress should be responsible for determining the circumstances for Section 11 liability—a task Congress has not undertaken.

Finally, the Ninth Circuit's stated policy concern that companies could be "incentivized to file overly optimistic registration statements accompanying their

direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements," Pet. App. 17a, is unfounded given the structure and purpose of direct listings. Because the issuer in the direct listing is a mere facilitator and not a first-order beneficiary of the transaction, the threat of Section 11 liability as a disincentive to misstatements or omissions serves less need in a direct listing. *See* Pet. 8 ("[W]hereas IPOs are typically designed to raise capital for issuers, Slack sold no shares and made no money in its direct listing."). In traditional IPOs, there are several organic "reputational incentives" for issuers to "be candid in their capital raising, and to select underwriters with an even greater reputational stake in candor," with or without Section 11. Langevoort, *Deconstructing Section 11: Public Offering Liability in a Continuous Disclosure Environment*, 63 Law & Contemp. Probs. 45, 63 (2000). The same can be said for direct listings. *See* Grabar et al., *A Look Under the Hood of Spotify's Direct Listing*, Harvard Law School Forum on Corporate Governance (Apr. 26, 2018) ("So while participants in a direct listing have plenty of reasons to exercise care in respect of disclosure, it is hard to see a strong argument that additional liability risk from Securities Act registration adds to those reasons."), https://bit.ly/3khAjZI.

In this light, expanding the definition of "such security" to cover shares not registered for sale as part of the direct listing, as the Ninth Circuit did, undermines the Securities Act's balance of transparency through disclosure and imposes burdens that risk inhibiting economic growth. In his forceful dissent, Judge Miller wrote "that failure of proof is significant and … outcome-determinative." Pet. App. 24a (Miller, J., dissent-

ing). "Strict liability is strong medicine," Judge Miller reasoned, "so the statute tempers it by limiting the class of plaintiffs who can sue." *Id.* In short, as Judge Friendly warned more than fifty years ago, the Ninth Circuit's broad reading of Section 11 that extends standing to sue to all holders of securities sold in a post-registration period is more than a "violent departure from the words that a court could … properly adopt." *Barnes*, 373 F.2d at 271.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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