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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Not content merely to defend the Ninth Circuit's judicial revision of the Securities Act of 1933, respondent contends that alleged policy concerns justify an even more dramatic expansion of the Act's scope of liability. His position ignores the Act's text and structure, does violence to the settled judicial and administrative interpretation of the statute, and eviscerates the core statutory distinction between registered and exempt shares. If adopted, respondent's approach would undermine the stability of the securities markets and chill capital formation, exposing issuers in every public offering to a vastly enhanced risk of near-strict liability for market losses. There is no basis for that result, which the SEC has pointedly declined to endorse.

Unlike the Securities Exchange Act of 1934, which covers all trading in securities, the '33 Act is narrower—it identifies certain shares for which companies making public offerings must file a registration statement and prospectus. The '33 Act's principal liability provisions, Sections 11 and 12, are equally targeted: If a registration statement or prospectus is misleading, anyone who purchased "such security" may sue. 15 U.S.C. §§ 77k(a), 77*l*(a).

The only reasonable reading of "such security"—and the only one consistent with surrounding provisions and the broader statutory context—is as a reference to the shares registered under the registration statement the plaintiff claims is misleading. That is how courts, the SEC, and commentators have understood the Act for decades, and Congress has never modified that textual limitation—despite repeated calls from plaintiffs dissatisfied with its consequences.

Respondent has other ideas, but not because he derives a different meaning of "such security" from the Act's text, context, and history. Instead, he declares those words insolubly ambiguous and urges a malleable reading of the Act he deems consistent with its "purpose." Under that results-driven view, "such security" demands only an amorphous "nexus" to the Act's requirement of a registration statement, and that nexus is present whenever a share is "related to" a registration statement—for instance, if the statement allegedly affected share prices, or if its filing enabled trading of exempt shares on an exchange. Resp. Br. 18, 23-24.

Respondent's view has no basis in the text. It reads out of the Act Congress's fine-tuned distinctions between shares subject to registration and those exempt from that requirement. And if endorsed, respondent's view would upend the carefully balanced and long-settled operation of the statutory scheme in contexts sweeping far beyond direct listings. Respondent concedes (at 38-39) that as he reads the Act, an issuer's potential liability in a typical IPO would not end even after a lockup period—thereby producing a massive increase in the hitherto-accepted scope of potential liability under the '33 Act. His reasoning would likewise produce a vast expansion of potential liability in cases involving multiple registration statements. That wholesale transformation of the Act would expose companies nationwide to crushing financial obligations based on innocent misstatements.

Worse, that transformation would happen for no good reason. Respondent's jeremiad about the dangers of direct listings is baseless—direct listings remain rare, and companies have compelling reasons to be truthful in registration statements. And if there

were a problem to be fixed, the solution would lie with Congress and the SEC, which have the authority and expertise to tinker with the delicate machinery of securities law.

Finally, in both courts below and in opposing certiorari, respondent conceded that only some Slack shares had to be registered and that he could not show the Slack shares he bought were registered. He has forfeited any arguments to the contrary, and the other issues he and his amici address likewise are not properly presented. The Court should reverse.

ARGUMENT

I. SECTIONS 11 AND 12 REQUIRE PLAINTIFFS TO PROVE THEY BOUGHT REGISTERED SHARES.

The '33 Act requires registration of some, but not all, shares, and a registration statement thus applies only to those shares registered under it. 15 U.S.C. §§ 77c-77d, 77e-77g, 77j; Slack Br. 4-5, 20-22. Sections 11 and 12 of the Act enforce that requirement, permitting suit by plaintiffs who purchased "such security." *Id.* §§ 77k(a), 77*l*(a). Respondent insists that "such security" is ambiguous, allowing him to choose whatever meaning suits his preferred outcome. Resp. Br. 17. But "'[a]mbiguity is a creature not of definitional possibilities but of statutory context'"; it does not arise merely from reading a provision "in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Here, the text of Sections 11 and 12, surrounding provisions of the '33 Act, broader statutory context, and a long history of uniform interpretation confirm that plaintiffs suing under Sections 11 and 12 must plead and prove they bought shares registered under the challenged registration statement.

A. Section 11 Requires Plaintiffs to Prove They Bought Registered Shares.

1. Respondent agrees that the "cornerstone" of the '33 Act is its registration requirement. Resp. Br. 4. But that requirement is not universal. Congress removed some classes of shares from the registration scheme, 15 U.S.C. § 77c, and separately exempted certain transactions—including those not involving an "underwriter"—from registration, *id.* § 77d. For shares *not* exempt from registration, Section 5 of the Act provides that "[u]nless a registration statement is in effect as to a security, it shall be unlawful . . . to sell such security." *Id.* § 77e(a). And Section 6 provides that registration statements are "effective only as to the securities specified therein" and requires the issuer to pay a fee based on the total price "at which such securities are proposed to be offered." *Id.* § 77f(a), (b)(1).

Notwithstanding respondent's efforts to gloss over the core statutory distinction between registered and exempt shares, the Act is clear: A registration statement is required for only those shares Congress did not exempt and covers only the particular shares registered, *not* every share on the market.

Section 11 enforces that requirement, giving a near-strict-liability remedy in the event of a misleading registration statement to those who purchased "such security." 15 U.S.C. § 77k(a). "Such" plays a limiting role, clarifying that the "security" whose purchase can produce liability is the one "described or implied or intelligible from the context" of the Act. CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1218 (1931 ed.). That can only mean shares subject to registration under the Act—not exempt shares.

Respondent argues that "such" cannot be shorthand for a category already defined in related statutory provisions and that Congress instead must "repeat[]" the full definition each time it uses "security." Resp. Br. 29. Courts have consistently rejected that view, holding that the "natural" way to read "such security" in Section 11 is as referring to the "newly registered shares" that are "issued pursuant to the registration statement" being challenged. *Barnes v. Osofsky*, 373 F.2d 269, 271-72 (2d Cir. 1967); *see* Slack Br. 23-25, 31-33; Pet. 15-21. Judge Friendly's logic remains unassailable: "[I]t 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." *Barnes*, 373 F.2d at 272.

Provisions throughout the '33 Act use "such security" in a similar way. Under Section 5, "[u]nless a registration statement is in effect as to a security," it is unlawful "to sell such security." 15 U.S.C. § 77e(a). There, "such security" means only those shares subject to registration, not all shares of the same class. Likewise, under Section 6, registration statements cover only "the securities specified therein," and applicants must pay a fee based on the "maximum aggregate price at which *such securities* are proposed to be offered." *Id.* § 77f(a), (b)(1) (emphasis added). Again, that language means only shares registered under the registration statement.

Section 11's damages provisions underscore its narrow scope. For instance, underwriters cannot be liable beyond "the total price at which the securities underwritten by [them] and distributed to the public were offered to the public." 15 U.S.C. § 77k(e). Section 11 thus caps an underwriter's liability at the total

proceeds received from the sale of shares registered under the misleading registration statement. That cap would make no sense if, as respondent contends, purchasers of *unregistered* shares could also sue. *Barnes*, 373 F.2d at 272; *see* Brief for the SEC at 4-5, *Barnes*, 373 F.2d 269 (Nos. 30867-30869).

2. Respondent's own view of Section 11 is a moving target. He initially contends (at 21) that "such security" in Section 11(a) must be ambiguous because it has no immediate referent. Respondent derides Slack's analysis as requiring "cross-provisional gymnastics" (Resp. Br. 29), but there is nothing unusual about looking for antecedents in earlier text. That is what it means to read statutes "in context," not "in isolation." *Brown & Williamson*, 529 U.S. at 132. That approach has a long lineage, *e.g.*, *Sims' Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 443-44 (1799) (explaining that the word "such" does "not always [refer] to the next immediate antecedent" and must be read "to preserve the sense of the context" in the statute), and certainly has more merit than abandoning text and structure in favor of supposed purpose.[1]

Elsewhere, respondent concedes that "'such securit[y]' refers to the registration statement previously mentioned" in the Act. Resp. Br. 23. But, citing *Barnes*, he pronounces the Act "ambiguous as to what nexus is required," *id.*—without acknowledging that *Barnes* held that the nexus required is the purchase

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[1] Respondent also misses the point with respect to the sentence preceding Section 11, which refers to "securities registered under" the Act. 15 U.S.C. § 77j(f). Section 10(f) is not the lone indication of what "such security" means; it simply confirms that nothing in Section 11's surrounding text suggests any meaning different from that indicated by the Act's other provisions.

of a registered share. Then, in search of a "broader" definition more "consistent with the Act's purposes," *id.* at 23-24, he proposes an ill-defined causal standard: any share whose sale is "made possible by" or is "related to" a registration statement. *Id.* at 17-18.

The core problem with respondent's view, aside from the lack of any basis in the text, is that it treats as irrelevant the Act's detailed provisions specifying which shares must be registered through a registration statement and which are exempt from registration. Respondent would have the Court hold that in the same statute in which Congress repeatedly distinguished between registered shares and those exempt from registration, 15 U.S.C. §§ 77c-77f, it also crafted a right of action for misleading registration statements covering the sale of *all* shares, whether registered or exempt. That implausible reading fails to fit all parts of the Act "'into an harmonious whole.'" *Brown & Williamson*, 529 U.S. at 133.

Respondent's reading also produces internal inconsistencies. On one hand, respondent argues that when Congress intended to refer to registered shares, "it made that intention express." Resp. Br. 23-24. In support, he cites Sections 4 and 5, which refer to securities with respect to which "a registration statement has been filed." 15 U.S.C. §§ 77d(a)(3)(B), 77e(b)(1). But on the other hand, respondent argues at length that registration statements cover exempt as well as registered shares—for instance, because the general company information included in registration statements "is not specific to registered . . . shares." Resp. Br. 8, 24. By erasing the statutory distinction between shares subject to the registration requirement and those exempt from it, respondent urges a view under which even *exempt* shares could be shares as to

which "a registration statement has been filed." That view proves far too much.

Respondent's view also produces results incompatible with his proffered policy rationales. Recognizing the decades of authority holding that Section 11 plaintiffs must show that they bought shares registered under the challenged registration statement (Slack Br. 31-35; Pet. 15-21), respondent argues that those authorities mostly involve cases featuring "multiple registration statements." Resp. Br. 19, 36-37. But in those circumstances, investors could equally be said to rely on the issuer's most recent registration statement containing "information Congress deemed essential to the valuation of any security." *Id.* at 25. Respondent does not explain how limiting Section 11 liability in multiple-registration-act cases is any less "freakish" or "random" (*id.* at 18, 25, 27-28) than in cases (like this one) when registered and exempt shares are intermingled. Respondent's criticisms echo those that have been raised since *Barnes* (Slack Br. 35-36), and they cannot justify the arbitrary revision of the statute he urges for direct listings.

Respondent is more forthright about the consequences of his view when it comes to routine IPOs. It has long been understood that plaintiffs will often be unable to sue under Section 11 following a post-IPO lockup, after which exempt shares join registered shares on an exchange. *See* Clayton & Grundfest Br. 6-7. Respondent agrees that his rule would discard that limitation. Resp. Br. 38-39. That is not a "modestly broader" reading (*id.* at 23); it is a "dramatically" broader view of the statute under which potential Section 11 liability for companies going public through a traditional IPO could "explode." Clayton & Grundfest Br. 7.

3. Respondent defends his malleable view of the Act not as a product of its text, but as a consequence of the NYSE direct-listing rule that the SEC approved. But the meaning of the '33 Act is not determined by what procedural steps might be required for a given type of listing under the rules of a particular exchange. What matters is what Section 11, which enforces the '33 Act's scheme specifying which shares must be registered, requires. And not even respondent suggests that the NYSE's rule is compelled by Section 11 (or any other part of the Act).

Instead, respondent and his amici make a bolder argument: that in approving a proposed rule for one exchange, the SEC meant to discard the '33 Act's entire architecture and require registration of *all* shares. Had the SEC intended to erase the '33 Act's animating distinction, it would have said so clearly. But the SEC has never said anything of the kind—and notably declined to do so here.

In fact, the SEC's own conduct refutes respondent's argument. Registration statements "must be approved by the SEC" before any shares are sold, *Madden v. Cowen & Co.*, 576 F.3d 957, 963 n.3 (9th Cir. 2009), and here the SEC approved Slack's registration statement even though Slack made clear that *not* all shares would be registered, C.A. ECF 11-2 at 49 (noting registration of 118,429,640 shares and registration fee based on those shares); *id.* at 225 (identifying shareholders with only some shares "being Registered"); *id.* at 235 (recognizing that shares could be sold if registered *or* "if they qualify for an exemption from registration"). Moreover, although respondent highlights (at 37) the SEC's discussion of how the longstanding "tracing" requirement would play out in the context of direct listings, Order Approving

Proposed Rule Change, 85 Fed. Reg. 85,807, 85,815-16 (Dec. 29, 2020), that discussion would have been entirely unnecessary if (as respondent urges) the SEC had meant to require registration for all shares. What the SEC actually said was that concerns about tracing "are not exclusive to" direct listings and are not "of such magnitude as to render [direct listings] inconsistent with the Act." *Id.*

4. Ultimately, respondent's real gripe is with current practical realities of the stock market. He recognizes that Section 11 must be construed in light of other provisions of the Act requiring only certain shares to be registered, Resp. Br. 8, 22 (citing 15 U.S.C. § 77f(a)), but complains that registration status is not "identified on the shares themselves" and that restrictive legends indicating which shares are exempt are removed before trading, making it difficult for purchasers to prove they bought registered shares, *id.* at 8-9.

Today's market realities do not rewrite yesterday's statute. What respondent calls "freakish[]" results of current trading practices (Resp. Br. 27) shed no light on what Congress intended in 1933, when the system of manually recorded physical exchanges of paper stock certificates made tracing considerably less difficult than under the modern electronic book-entry system. *In re FleetBoston Fin. Corp. Sec. Litig.*, 253 F.R.D. 315, 344-45 & n.30 (D.N.J. 2008). If there were a problem with the way electronic shares are currently labeled, the solution would be for Congress or the SEC to prescribe new requirements, *infra* at 21—not for the courts to abandon the Act's limits.

B. Section 12(a)(2) Requires Plaintiffs to Prove They Bought Registered Shares.

Section 12 makes liable anyone who sells a security "by means of a [misleading] prospectus . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(2). In *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), this Court interpreted "prospectus" to mean the same thing in Section 12(a)(2) as in Section 10: a formal document setting out the same information that must be included in the registration statement. *Id.* at 569-72. And as the Court explained, a share is sold "by means of a prospectus" only in connection with "a public offering of securities by an issuer or controlling shareholder." *Id.* at 571, 584. For that reason, Section 12 generally requires plaintiffs to show that they bought registered shares in a public offering. Elliott J. Weiss, *The Courts Have It Right: Securities Act Section 12(2) Applies Only to Public Offerings*, 48 BUS. LAW. 1, 3 (1992) (Section 12 "appl[ies] only to sales of securities in public offerings").

Respondent contends that Congress must have intended Section 12(a)(2) to apply more broadly because it extends liability to "[*a*]*ny* person" who "sells *a* security." Resp. Br. 41. But he ignores Section 12's limiting language, which permits suit only by purchasers of "such security"—i.e., one sold "by means of a prospectus." 15 U.S.C. § 77*l*(a)(2). The leading commentary on Section 12(a)(2) at the time the Court decided *Gustafson* emphasized that language, explaining that "by means of a prospectus" operates "as a limitation" referring back to the "statutory context" of the Act, including the Act's focus on registered public offerings and its exclusion of "transactions that section 4 exempts from registration." Weiss, 48 BUS. LAW. at 4-7. That view featured in the briefing in *Gustafson*, *e.g.*,

Brief for Petitioners at 14, 24, *Gustafson*, 513 U.S. 561 (No. 93-404), 1994 WL 178124, and was embraced in the Court's opinion, 513 U.S. at 569 (defining prospectus as "confined to documents related to public offerings"). Ultimately, respondent's contention about Section 12(a)(2)'s "broad[]" framing (Resp. Br. 5) cannot be reconciled with *Gustafson*'s holding that Section 12's "limiting language . . . requires a narrow construction." 513 U.S. at 577.

Other provisions of the Act confirm that narrow reach. Section 5, for instance, makes it unlawful to transmit "any security with respect to which a registration statement has been filed" unless "*such security* . . . [is] accompanied or preceded by a prospectus" satisfying the Act's requirements. 15 U.S.C. § 77e(b) (emphasis added). Section 12 mirrors that structure, providing that the sale of "a security . . . by means of a [misleading] prospectus" gives "the person purchasing *such security*" the right to sue. *Id.* § 77*l*(a) (emphasis added). The Act thus draws a direct parallel between the registration requirement and the scope of liability for misleading prospectuses.

Respondent looks elsewhere to bolster his theory that a share sold "by means of a prospectus" can mean *any* share, including unregistered shares like those in Slack's direct listing. He claims to find it in a parenthetical of Section 12(a)(2), which creates liability for selling a qualifying "security (whether or not exempted by the provisions of [Section 3 of the '33 Act])." 15 U.S.C. § 77*l*(a)(2). As respondent sees it, "the parenthetical makes clear that 'a security' can include a security for which no registration statement is required." Resp. Br. 42.

That parenthetical supports Slack's argument, not respondent's. It extends potential Section 12(a)(2)

liability to certain *classes* of securities otherwise exempted by Section 3, but *not* to sales of shares exempted by Section 4 (like those at issue here).

In a footnote, respondent insists that this clear textual distinction "makes no difference" because Congress must have assumed that transactions exempt from registration under Section 4 would also be covered by Section 12(a)(2). Resp. Br. 42 n.21. But Congress's distinct treatment of Sections 3 and 4 must be given meaning. This Court made that very point in *Gustafson*, explaining that had Congress intended to sweep Section 4-exempt transactions into Section 12(a)(2), it would have said so. 513 U.S. at 573. "Congressional silence cuts against, not in favor of," respondent's argument. *Id.*

For the same reason, respondent's reliance on other isolated statements from *Gustafson* is misplaced. He quotes (at 41) a statement that Section 12(a)(2) "applies to every class of security (except one issued or backed by a governmental entity), whether exempted from registration or not." *Gustafson*, 513 U.S. at 580. That language, like the text of Section 12 it summarized, describes *classes* of securities exempt under Section 3, not particular transactions exempt under Section 4. So too with respondent's quotation (at 43-44) of the statement that liability under Section 12(a)(2) "cannot attach unless there is an obligation to distribute the prospectus in the first place (or unless there is an exemption)." *Gustafson*, 513 U.S. at 571. In context, the "exemption" clearly refers to Section 3, not Section 4, just like the Section 12(a)(2) parenthetical it reflects.

Congress's distinct treatment of Sections 3 and 4 makes sense. Given the '33 Act's focus on "public offerings," *Gustafson*, 513 U.S. at 571, it was natural for

Congress to extend Section 12(a)(2)'s reach to Section 3 classes of shares—for instance, securities issued by savings-and-loan institutions or common carriers—which are typically "sold or distributed in transactions that resemble public offerings," Weiss, 48 BUS. LAW. at 24. Section 4's exemptions, conversely, cover transactions "not involving any public offering" or any "issuer, underwriter, or dealer," 15 U.S.C. § 77d(a)(1)-(2)—including transactions exempt under Rule 144, which resemble routine "trading transactions," Weiss, 48 BUS. LAW. at 44-45. Respondent himself recognizes that Rule 144 exempts transactions by individuals not "engaged in the distribution of . . . securities," Resp. Br. 5, which makes it unsurprising that Congress treated those shares differently than it did most Section 3 shares.

Respondent's real complaint is with whether any shares in Slack's direct listing were properly exempt under Section 4 and Rule 144. Resp. Br. 26. There is a cause of action related to sales of unregistered shares for which registration was required, 15 U.S.C. § 77*l*(a)(1), but respondent has never asserted it (because it would be baseless here). Regardless, that forfeited issue is no reason to disregard Section 12(a)(2)'s plain text.

Finally, respondent offers two flawed arguments for why this case fits Section 12(a)(2)'s framework as a factual matter. He first contends that "without [a prospectus] being filed and distributed, none of the shares could be sold" on the NYSE. Resp. Br. 41 n.20; *accord id.* at 44. That just restates his "nexus" argument under Section 11, and it is equally atextual and illogical for purposes of Section 12(a)(2) for all the reasons discussed above. Respondent next speculates (without citation or elaboration) that anyone selling

Slack shares in the direct listing "would naturally provide prospective purchasers Slack's filed prospectus," even if those shares were exempt from registration. Resp. Br. 45. But the unlikely possibility that a seller of stock might gratuitously provide a prospectus to the buyer does not transform the transaction into one subject to the '33 Act prospectus requirement that Section 12(a)(2) enforces.

C. Context, Structure, and History Confirm the Meaning of Sections 11 and 12(a)(2).

In rushing to declare the statutory text ambiguous, respondent ignores contextual, structural, and historical evidence confirming that Sections 11 and 12 require plaintiffs to plead and prove that they bought registered shares.

1. Congress's use of "such security" in Sections 11 and 12 contrasts with broader language used elsewhere to capture *all* shares, registered and exempt. Consider Section 17 of the '33 Act and Section 10(b) of the '34 Act, antifraud provisions covering the sale of "any" securities. 15 U.S.C. §§ 77q(a), 78j(b). As this Court has explained, that broad language makes those provisions "'catchall[s]'" for all trading in shares. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). The language in Sections 11 and 12, conversely, is more "limited" and can be invoked only by "purchasers of a registered security." *Id.* at 381-82.

"'[D]ifferences in language like this convey differences in meaning,'" particularly "when the same Congress passed both statutes to handle much the same task." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071-72 (2018). Yet respondent offers no response to that crucial textual distinction.

The phrase "such security" in Sections 11 and 12 also differs from language elsewhere covering "classes" of securities. *E.g.*, 15 U.S.C. §§ 77c(a), 78*l*(c), 78m(c), 78p(a)(1); *see* Slack Br. 20-22, 29-30. The SEC made this point in *Barnes* (SEC Br. 6), and Judge Friendly agreed, rejecting the idea that Section 11 permits suit by anyone who buys a share "of the same nature as that issued pursuant to the registration statement," 373 F.2d at 271. Again, the broader language Congress used elsewhere confirms the narrow scope of the language it chose in Sections 11 and 12.

Respondent ignores this distinction, too. That omission is telling because, in opposing certiorari, he defended the decision below on the ground that Sections 11 and 12 apply to purchases of exempt shares "of the same type and character" as shares registered under the challenged registration statement. Br. in Opp'n 1, 4, 17. Respondent now abandons that framing, conceding that Sections 11 and 12 do not feature the capacious language Congress used to cover all shares of the same class—yet the outcome he seeks is effectively indistinguishable from that rightly abandoned theory.

2. Respondent gives short shrift to the principle that the '33 and '34 Acts "should be construed harmoniously because they 'constitute interrelated components of the federal regulatory scheme governing transactions in securities.'" *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-85 (1989). The Acts operate in tandem: Section 10(b) of the '34 Act "is general in scope," reaching all trading in securities but requiring proof of scienter, whereas Sections 11 and 12 are "far narrower" in their reach but ease the scienter requirement. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752

(1975). By erasing the '33 Act's distinction between registered and exempt shares, respondent's view would upset that balance, "creat[ing] vast additional liabilities that are quite independent of" the registration requirement the Act imposes. *Gustafson*, 513 U.S. at 571-72.

Respondent offers two unpersuasive responses. First, he contends (at 18-19) that the '34 Act did not amend, and therefore has no bearing on, the '33 Act. That is doubly wrong. The '34 Act (enacted by the same Congress) did amend its predecessor, including extensive revisions to Section 11. Securities Exchange Act of 1934, ch. 404, tit. II, 48 Stat. 881, 905-09. And Congress has since continued to fine-tune both Acts as "'interrelated components'" of securities law. *Rodriguez*, 490 U.S. at 484-85. Analyzing the '33 Act's limits in light of the '34 Act is not "overlook[ing] chronology" (Resp. Br. 34); it is respecting the balance Congress struck and has maintained.

Second, respondent notes that the Acts may include "overlapping remedies." Resp. Br. 34-35. Slack has never argued otherwise. The point is that courts construing the Acts must respect the way the laws fit together—for instance, whereas Section 10(b) "is a 'catchall' antifraud provision" whose broad scope is tempered by the "heavier burden to establish a cause of action," Section 11's "relatively minimal burden" is offset by the statute's "limit[ation] in scope" to "purchaser[s] of a registered security." *Herman & MacLean*, 459 U.S. at 382.

3. Respondent has little to say about Congress's decision not "to disturb [the] consistent judicial interpretation" of the '33 Act. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988). In a line of cases stretching back to Judge Friendly's decision in

Barnes—a line unbroken until this case—courts consistently held that plaintiffs must prove they bought registered shares. Pet. 15-21; Slack Br. 31-33. The SEC has uniformly endorsed that view for decades in amicus briefs filed in this Court and across the courts of appeals, and leading treatises have done the same. Slack Br. 33-35. And although Congress has modified the '33 Act in many respects over the years, it has never eliminated or relaxed the requirement that plaintiffs prove they bought shares registered under the challenged registration statement. *Id.* at 36-38.

Respondent does not dispute the principle of congressional ratification; he disputes only what was ratified, pointing out that the authorities Slack discussed are mostly "multiple-registration cases." Resp. Br. 35-37. But the rule of law those authorities state is not so limited. Rather, they recognize that given the '33 Act's focus on the registration requirement, its stringent remedies are limited to those who purchased shares registered under the allegedly misleading registration statement. Slack Br. 31-35; Pet. 15-21. Nothing about that reasoning is limited to the specific context of multiple-registration-statement cases—which is why courts have applied that reasoning in cases involving other factual circumstances. *E.g.*, *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 498-99 (5th Cir. 2005); *Jensen v. iShares Tr.*, 44 Cal. App. 5th 618, 638-39 (2020).

This long history that respondent seeks to upend reveals the irony in his contention that companies like Slack are trying "to achieve through litigation what they could not accomplish through the political process." Resp. Br. 2. Respondent's protests have been raised, without success, countless times over the decades. The plaintiffs in *Barnes* complained that

Section 11's limitation would make the ability to sue "turn on mere accident," 373 F.2d at 271; respondent decries it as "just happenstance," Resp. Br. 3, 9. The plaintiffs in *Krim* argued that Section 11's text should yield to "market realities" that make it difficult "as a practical matter" to satisfy the statute, 402 F.3d at 498-99; respondent raises the same objection, Resp. Br. 8-9, 30-31. None of this is new, and the answer remains the same: Congress and the SEC have ample authority to act if any valid concern arises.

II. RESPONDENT'S POLICY CONCERNS ARE IRRELEVANT AND OVERSTATED.

1. Like the Ninth Circuit's decision, respondent's argument depends on policy objections to reading the '33 Act as courts, regulators, and commentators have done for decades. He defends that approach by pointing to the Act's "remedial" nature. Resp. Br. 23-27. But remedial purpose is no substitute for enacted text. Slack Br. 38-40.

The Ninth Circuit believed its decision was necessary because no issuer "would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing." Pet. App. 17a. Respondent and his amici echo this claim, speculating that Slack and other companies turned to direct listings in a scheme to evade Section 11. Resp. Br. 5, 12-13, 21, 27; *accord, e.g.*, Institutional Investors Br. 16-18; Business Professors Br. 17-20.

That accusation cannot be squared with reality. Direct listings are rare because most companies going public desire the underwriting services available in traditional IPOs. Less than one percent of companies to go public since the first direct listing in 2018 have chosen the direct-listing mechanism. U.S. Chamber

Br. 7-8. And the few companies to do so had reasons to favor direct listings that have nothing to do with avoiding liability. *Id.* at 3-4, 8-9. Spotify summarized several ahead of its pioneering direct listing: It wanted "to offer liquidity for shareholders," including employees; "to provide equal access to all buyers and sellers," with "no built in 'pop' " for preferred clients of investment banks; and "to enable market-driven price discovery . . . without the friction created by traditional lock-ups and a limited float." 1 HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC HANDBOOK § 3:157 (2022 ed.). Slack favored a direct listing for the same legitimate reasons.

Although the problem respondent identifies is not real, the harmful effects of his proposed solution would be. Respondent makes clear that, in his view, there should be Section 11 and Section 12(a)(2) liability not just in every direct listing, but whenever there is some connection between the filing of a registration statement and the public trading of shares—a position that would dramatically expand the hitherto-accepted scope of liability. *Supra* at 8. That upheaval would impose serious real-world costs. It would make valuable private companies reconsider the idea of going public. Cato Br. 7-8. It would increase the already-high costs of insuring directors and officers against securities suits. Washington Legal Foundation Br. 16-17. And it would curtail innovation, discouraging issuers from experimenting with new methods of going public that, like direct listings, promise lower transaction costs, greater liquidity for early investors and employees, and fairer access for retail investors to shares of newly public companies. *Id.* at 15; Cato Br. 7-8; Slack Br. 44-46; 85 Fed. Reg. at 85,816.

2. Even if there were a problem that needed solving, the Court should decline respondent's invitation to solve it by rewriting the '33 Act. From *Barnes* on, courts have rejected calls to disregard the statutory text to vindicate what respondent calls the Act's "remedial" purpose. Slack Br. 35-36. The many amici on both sides here, and the variety and complexity of solutions they propose, demonstrate the wisdom of that restraint.

Those briefs alone identify many ways Congress or the SEC could address the concerns respondent raises without mangling the '33 Act. They could require a lockup period during which only registered shares would trade. Clayton & Grundfest Br. 32-33. They could require issuers to use a different ticker for registered and exempt shares. *Id.* at 31-32; Institutional Investors Br. 9-10. Or they could insist that every share be labeled as registered or exempt, perhaps on a blockchain. Slack Br. 47; Cato Br. 13-14; Clayton & Grundfest Br. 33; Business Professors Br. 3 n.2.

Whether any of these proposals is sound makes no difference here. The point is that the political branches have ample tools to remedy any problems that may arise with the existing regime. This Court should not substitute its policy judgment for that of legislators and regulators who possess the expertise and authority to decide whether these proposals—or others not briefed—are worth pursuing.

III. THE OTHER ISSUES RESPONDENT AND AMICI IDENTIFY ARE NOT PROPERLY PRESENTED.

Respondent ends his brief (at 45-50) by focusing, like his amici, on issues that are forfeited and not before the Court.

As respondent acknowledges (at 15, 49), he consistently conceded below that he could not plead or prove that he bought registered shares. Nor did he challenge Slack's petition-stage statement that he "does not and cannot allege" the shares he purchased were "registered under the registration statement." Pet. 9. So "even assuming [respondent] did not waive the argument below, [he] has done so in this Court." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 107 (2015) (citing Sup. Ct. R. 15.2); *see United States v. Jones*, 565 U.S. 400, 413 (2012) (argument forfeited when not raised below).

Respondent and amici speculate about how plaintiffs in future cases might show that they bought registered shares. They invoke concepts like statistical tracing, judicially imposed burden-shifting frameworks, and technological means of determining which shares are registered. Many of those proposals defy longstanding law—respondent's contention that plaintiffs should have recourse to discovery even if they cannot plausibly allege that they bought registered shares, for instance, is contrary to the rule that plaintiffs "armed with nothing more than conclusions" cannot "unlock the doors of discovery," *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), and statistical-tracing arguments have been correctly rejected in the lower courts, *e.g.*, *Krim*, 402 F.3d at 498-99. But in any event, none of these forfeited questions is properly before the Court.

If anything, those arguments further undermine respondent's theory on the question that *is* presented. If respondent is right that it should be "relatively simple" for future plaintiffs to show they bought registered shares, even in a direct-listing case (Resp. Br. 46), he cannot also be right that requiring plaintiffs to

satisfy that requirement will produce "arbitrary" or "freakish" results (*id.* at 18).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint with prejudice.

Respectfully submitted.

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March 29, 2023