No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC, ET AL.,
Petitioners,

v.

FIYYAZ PIRANI,
Respondent.

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

BRIEF OF FORMER SEC OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are former commissioners and senior officials of the U.S. Securities and Exchange Commission (SEC) who served under both Republican and Democratic Presidents and went on to serve as leaders in industry and the academy. Collectively, they have decades of experience in administering and enforcing securities laws. Signatories include:

- Luis A. Aguilar, who served as a Commissioner of the SEC from 2008 to 2015. He was originally appointed by President George W. Bush and then reappointed by President Barack Obama. He has been a partner at McKenna Long & Aldridge, LLP (subsequently merged with Dentons US LLP); Alston & Bird LLP; Kilpatrick Townsend & Stockton LLP; and Powell Goldstein Frazer & Murphy LLP (subsequently merged with Bryan Cave LLP). During his time at the SEC, Commissioner Aguilar represented the Commission as its liaison to both the North American Securities Administrators Association and to the Council of Securities Regulators of the Americas. He also served as the primary sponsor of the SEC's first Investor Advisory Committee. He began his legal career as an attorney at the SEC.
- Roberta Karmel, who was a Commissioner of the SEC from 1977 to 1980, and is the former Centennial Professor of Law at Brooklyn Law School (currently Research Professor). Prior to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or its counsel made such a contribution.

that, she was an enforcement attorney, Branch Chief, and Assistant Regional Administrator in the SEC's New York Regional Office. Commissioner Karmel is a former Public Director of the New York Stock Exchange, and was also a Fulbright Scholar studying the harmonization of the securities laws in the European Union. She is the author of *Life at the Center: Reflections on Fifty Years of Securities Regulation* (2014) and *Regulation by Prosecution: The Securities and Exchange Commission Versus Corporate America* (1982), and has widely published articles on securities regulation and international securities law in dozens of law reviews and journals.

- Allison Herren Lee, who served as a Commissioner of the SEC from 2019 to 2022 (and as Acting Chair in 2021). Previously, she served for over a decade in various roles at the SEC, including as Counsel to Commissioner Kara Stein and as Senior Counsel in the Division of Enforcement's Complex Financial Instruments Unit. In addition, she has served as a Special Assistant U.S. Attorney. Prior to government service, she was a partner at Sherman & Howard LLC, focusing on securities, antitrust, and commercial litigation. Currently, she is an Adjunct Professor and Senior Research Fellow at New York University School of Law.
- Bevis Longstreth, who served as a Commissioner of the SEC from 1981 to 1984, was appointed twice by President Ronald Reagan. He has also served as an Adjunct Professor at Columbia University School of Law and on various boards, including the Board of Governors of the American Stock Exchange and the Pension Finance Committee of The World Bank.
- John Coates, who served as General Counsel and as Acting Director for the Division of Corporation

Finance for the SEC. He now is the John F. Cogan Professor of Law and Economics at Harvard Law School, where he also serves as the Deputy Dean for Finance and Strategic Initiatives and Research Director of the Center on the Legal Profession. Before joining Harvard, he was a partner at Wachtell, Lipton, Rosen & Katz, specializing in financial institutions and M&A. He has testified before Congress, advised the U.S. Department of Justice, the U.S. Department of Treasury, and the New York Stock Exchange, and served as the Chair of the Investor-as-Owner Subcommittee of the Investor Advisory Committee of the SEC.

- Jane B. Adams, who served as Acting Chief Accountant of the SEC in 1998, and Deputy Chief Accountant from 1997-2000. She advised and represented the Chairman and Commission on accounting, disclosures, financial reporting, and corporate governance matters.
- Tyler Gellasch, who served as Counsel to Commissioner Kara Stein from 2013 to 2014. He currently is President and CEO of the Healthy Markets Association and cofounder of Myrtle Makena, LLC, a financial and economic policy consulting firm.
- Matthew Cain, who served as Advisor to Commissioner Robert J. Jackson in 2018, and previously as a financial economist at the SEC. He currently is a Senior Fellow at the Berkeley Center for Law and Business.[2]

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[2] The views expressed by *amici* do not necessarily reflect the views of the institutions with which they are or were associated, whose names are included solely for identification purposes.

Together, *amici* have a longstanding interest in the integrity of public markets and the deterrence of and legal remedies for misrepresentations in registration statements and prospectuses.

SUMMARY OF ARGUMENT

Truthful public disclosures are at the heart of the Securities Act of 1933, the statutory mandate of the Securities and Exchange Commission (SEC), and the integrity of the stock markets. These disclosures typically take the form of registration statements and prospectuses and require a high duty of care in their preparation. When such disclosures turn out to be untruthful, however, Sections 11 and 12 of the Securities Act create civil liability in order to protect investors and deter fraud. Over the years, these requirements and incentives have collectively fostered integrity in U.S. markets and helped make them the envy of the world.

Today, Sections 11 and 12 remain important tools for private litigants and public officials alike. The availability of private enforcement through civil litigation is a vital complement to SEC enforcement efforts, particularly in light of the SEC's resource constraints. While sections of the Exchange Act of 1934, such as 10(b), provide investors with a different cause of action with higher scienter requirements, that is not an adequate replacement for plausible claims pled under Sections 11 and 12 of the Securities Act. In practice, both retail investors and finance professionals continue to rely on registration statements, prospectuses, and other required disclosures as central sources of truthful information when pricing and buying shares – regardless of whether those shares are sold by an issuer or by a shareholder.

The case at bar involves an investor who bought shares in a company through a new form of public sale known as a selling shareholder direct listing. Notably, in approving the new rules about direct listings, the SEC mandated that companies *still* put a Securities Act registration statement on file. Indeed, it was the expectation of the SEC that this statement would encompass *all* the selling shareholders' shares -- without regard to whether *some* might be otherwise exempt from registration under any other rule.

The SEC's intent is borne out by the history, structure and function of direct listings. Circa 2008 and 2018, when the SEC took various actions to approve direct listings, it consistently required a registration statement be on file and rebuffed an attempt to eliminate this requirement. Structurally, the SEC's analyses of and decisions about the requirements for direct listings did not distinguish between registered and unregistered shares – let alone suggest that registration statements applied only to the former for direct listings. In practical terms, the SEC expected that shares like Respondent's were functionally sold in conjunction with (and in reliance upon) the company's registration statement.

By contrast, Petitioners' view of Sections 11 and 12 would significantly restrict the application of the Securities Act to an important array of new offering types beyond the classical IPO. It blinks at reality to suggest that the SEC or Congress expected investors to have somehow figured out which type of share they were purchasing before choosing whether to rely upon information contained in official disclosures. Petitioners' view could also have chilling effects on future SEC rulemakings and innovations. Ultimately, however the Court decides this particular controversy, *amici* respectfully recommend it proceed carefully on

the broader question of tracing registered versus unregistered shares.

ARGUMENT

The Securities Act of 1933 and the Exchange Act of 1934 "were enacted primarily to prevent the recurrence of those abuses . . . responsible for the October 1929 stock market crash and [] depression." Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311, 315-16 (1974) (citations omitted). The "overriding concern of Congress in passing the legislation was to provide protection for small investors, many of whom had lost their savings by investing in the securities markets in the late twenties and early thirties." *Id.*

"The choice of disclosure as the primary means of policing the securities industry reflected the influence . . . of Louis D. Brandeis," who "had argued persuasively that publicity was the most effective means of . . . curtailing self-dealing and conflicts of interest." *Id.* at 318-319 (citing Louis Brandeis, *Other People's Money and How the Bankers Use It* 99-105 (1914)). "Moreover, disclosure could [deter both illegal and unethical conduct] with a minimum of government intervention . . . ." *Id.* at 319 (citations omitted).[3]

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[3] *Accord* Anderson, *supra*, at 319 ("Roosevelt and his advisers, believing that the nation's economic recovery depended on a revival of confidence in, and within, the private sector, saw the immediate goal of financial reform as the restoration of the public's confidence in the securities markets."); *id.* at 319-320 ("the financial community generally considered a disclosure statute acceptable.") (citations omitted).

I. PRIVATE ENFORCEMENT OF SECTIONS 11 AND 12 IS IMPORTANT, UNIQUE, AND COMPLEMENTARY TO OTHER SEC EFFORTS.

Under this disclosure framework, the "crucial instruments . . . are the registration statement that is required to be filed in advance of a public offering and the prospectus . . . ." Milton H. Cohen, *"Truth in Securities" Revisited*, 79 Harv. L. Rev. 1340, 1344 (1966). These disclosures cover two primary subjects: "(1) the offering itself -- including the underwriting and distributing arrangements, the underwriting and selling costs, factors bearing on determination of the offering price, and the intended use of proceeds"; and "(2) the issuer's business and property, its recent history, its controlling and controlled persons, its management and their compensation and interests, its material contracts, its capital structure and options, the terms of its out- standing securities, and, perhaps most important of all, its financial condition and results of operations." *Id.* at 1345. *See also* 15 U.S.C §§ 77g, 77aa (describing registration contents); *id.* at 77e(b)(1), 77j(1) (describing prospectus contents). Notably, the registration "statement must be manually signed, not merely in the name of the registrant itself but by each of several designated senior officers and by a majority of the directors." Cohen, *supra* at 1354.[4] The statement is then carefully reviewed by the SEC. *See* 15 U.S.C §§ 77f, 77h.

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[4] "The prospectus contained basically the same information as the registration statement, but was expected to serve additional protective functions," particularly "limit[ing] the selling arguments used by securities salesmen." Anderson, *supra* at 324 (citations omitted).

Sections 11 and 12 of the Securities Act are the lynchpin of the disclosure framework. Section 11, in particular, "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983). This standard for civil liability "ultimately account[s] for the enormous care with which this particular disclosure process is handled . . . ." Cohen, *supra* at 1354. "When the law was first enacted, there was wide concern that legitimate financing would be hampered by imposing undue risks of liability . . . . In actual experience, however, instances of liability have been remarkably few; instead, the liability provisions have had the *in terrorem* effect of creating an extraordinarily high sense of care and responsibility in the preparation of registration statements." *Id.* at 1355.

To this day, Sections 11 and 12 remain critical tools in protecting the stock markets. Indeed, SEC commissioners and committees have repeatedly emphasized the importance of these two provisions. *See, e.g.*, SEC, *Disclosure to Investors: A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts* at 113 (1969) [hereinafter cited as Wheat Report) ("The prospectus in the case of a first public offering is a uniquely valuable document. . . . [the] product of joint effort and examination in depth, stimulated by the liability provisions of Section 11 of the '33 Act."); Remarks of David S. Ruder, Chairman of the U.S. Securities and Exchange Commission, *The Evolution of Disclosure Regulation by the Securities and Exchange Commission* at 1 (March 10, 1988) (decades after the enactment of the 1933 Act, "a balanced full disclosure philosophy still serves as a

touchstone for the Commission's continuing regulation of disclosures regarding publicly traded securities."); SEC, *Report of the Advisory Committee on the Capital Formation and Regulatory Process* (July 24, 1996) ("it is the Committee's view that Section 11 liability continues to play an integral role in compelling 'truth in securities'. . . . [and] that Section 11 should continue to be applied").

The availability of private enforcement through civil litigation (under Section 11 and 12) is a vital complement to SEC enforcement efforts, particularly in light of the SEC's resource constraints. In recent years alone, the Commission has repeatedly informed the Court of its view that private actions serve an essential role in its filings in *Erica P. John Fund, Inc. v. Halliburton Co.*, 2014 WL 466853 (2011); *Merck & Co., Inc., v. Reynolds*, 2009 WL 3439204 (2010); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 2007 WL 460606 (2007); and *Dura Pharmaceuticals v. Broudo*, 2004 WL 2069564 (2005). As then-Chairman Richard Breeden explained in congressional testimony, the SEC "does not have adequate resources to detect and prosecute all violations of the federal securities laws," private actions thus "perform a critical role in preserving the integrity of our securities markets," and such actions are "also necessary to compensate defrauded investors." *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. On Securities of the Senate Comm. On Banking, Housing and Urban Affairs*, 102d Cong. 1st Sess. 15-16 (1991). Even outside the context of express causes of action, this Court has "repeatedly emphasized" that "private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472

U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

Whatever the Court decides about the question presented in this case, it should ensure that the crucial protections of Sections 11 and 12 remain realistically available to injured investors, particularly because the functions and standards of Sections 11 and 12 are different from other provisions of the securities laws. Petitioners contend that even if Sections 11 and 12 did not apply, plaintiffs could pursue claims under Section 10(b) of the Exchange Act. *See* Pet. Br. 30. But cases brought under 10(b) have materially different requirements than Sections 11 and 12, namely elevated scienter requirements.[5] Section 10(b) is not a panacea or replacement for plausible claims brought under Sections 11 and 12.

Indeed, in creating the express private rights of action in the Securities Act, including Sections 11 and 12, Congress directly rejected including scienter requirements, believing they would render civil enforcement ineffective. *See e.g.*, Krista L. Turnquist, *Pleading Under Section 11 of the Securities Act of 1933*, 98 Mich. L. Rev. 2395, 2402 (2000). ("Representative Sam Rayburn emphasized the importance of the absence of a scienter requirement in the legislative history of the Securities Act when he stated that, '[e]very lawyer knows that with all the facts in the control of the [seller] it is practically impossible for a buyer to prove a state of knowledge or

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[5] *Compare* Federal Judicial Center, *Federal Securities Law* at 76 (4th ed. 2022) ("Section 11 does not require scienter and has been held by most courts not to implicate the enhanced pleading requirements") *with id.* at 127-128 (the "scienter standard applies under Rule 10b-5 regardless of whether the action is a private damage action or an enforcement action brought by the SEC").

a failure to exercise due care on the part of the [seller].'") (quoting H.R. Rep. No. 73-85, 73rd Cong. 1st Sess. at 9 (1933) (statement of Rep. Sam Rayburn)).

In practice, both markets and investors rely – and need to be able to rely – on registration statements and prospectuses when pricing and buying shares. "Directly or indirectly, millions of financial professionals, institutional investors, and small investors depend on the quality, timeliness, and reliability of the disclosure mandated by the Federal securities laws." Ruder, *supra* at 2. Such disclosures remain central sources of truthful information when pricing and buying shares of all kinds, whether from an issuer or from a shareholder. This Court has recognized that if "investors cannot rely upon the accuracy and completeness of issuer statements, they will be less likely to invest, thereby reducing the liquidity of the securities markets to the detriment of investors and issuers alike." *Basic Inc. v. Levinson*, 485 U.S. 224, 235 n.20 (1987) (citation omitted). Likewise, the legislative record from the 1930s reflects that Congress recognized the importance of disclosures for market pricing dynamics.[6]

Amici's collective experience underscores that the robust application of Sections 11 and 12 remains deeply important. As SEC commissioners and staff have long stressed, effective disclosure requirements

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[6] *See* H.R. Rep. No. 1383, 73rd Cong. 2d Sess. 11 (1934) (although "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, . . . truth does find relatively quick acceptance on the market."); S. Rep. No. 1455, 73rd Cong. 2d Sess. 68 (1934) ("Insofar as the judgment of either [buyer or seller] is warped by false, inaccurate, or incomplete information regarding the corporation, the market price fails to reflect the normal operation of the law of supply and demand.").

are essential to making American securities markets the envy of the world. *See, e.g.*, Chair Mary Jo White, *Testimony on SEC Budget*, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives (May 7, 2013), https://www.sec.gov/news/testimony/2013-ts050713mjwhtm ("The U.S. markets are the envy of the world precisely because of the SEC's work effectively regulating the markets, requiring comprehensive disclosure, and vigorously enforcing the securities laws."); Commissioner Robert J. Jackson Jr., *Statement on Volcker Rule Amendments* (Sept. 19, 2019), https://www.sec.gov/news/public-statement/statement-jackson-091919 ("The benefits of investor trust in our financial markets are hard to quantify, but they're doubtless a reason why our markets are the envy of the world."); Chairman Christopher Cox, *Statement to SEC Staff* (Aug. 4, 2005), https://www.sec.gov/news/speech/spch080405 cc.htm ("So why is it that our markets are the gold standard? It boils down to trust. Investor confidence. The integrity of the system. The world has faith in our markets because it has faith in the integrity of the people minding the store."); Commissioner Allison Herren Lee, *Investing in the Public Option: Promoting Growth in Our Public Markets*, Remarks at The SEC Speaks in 2020 (Oct. 8, 2020), https://www.sec.gov/news/speech/lee-investing-public-option-sec-speaks-100820#_ftn3 ("[T]he federal securities laws provide robust registration and reporting requirements, which have created a comparatively level playing field for investors—even the smallest investors—and allowed them to participate in returns in our public markets, often described as the envy of the world."). This Court too, has confirmed that the "importance of accurate and complete issuer disclosure to the integrity of the

securities markets cannot be overemphasized," *Basic*, 485 U.S. at 235 n.12 (citation omitted).

II. IN APPROVING DIRECT LISTINGS, THE SEC EXPECTED SECTIONS 11 AND 12 WOULD APPLY.

This case involves an investor who bought shares in Slack Technologies, LLC ("Slack"), pursuant to a new form of public sale known as a selling shareholder direct listing. Crucial to the resolution of this case is understanding the interplay between Sections 11 and 12 and the SEC's approval of direct listings. As Respondent points out, Br. 11 n.7, the "parties have litigated this case on the premise that Slack was not required to register all the shares to be sold in the direct listing. . . . But there is reason to think the premise is false."

The regulatory process that enabled direct listings unfolded in a series of SEC orders in 2008, 2018, and 2020. Throughout it all, the SEC conspicuously required that companies undergoing a direct listing *still* put a Securities Act registration statement on file (known as a "selling shareholder registration statement"), even though some or even all of the shares might arguably be exempt. This requirement reflects the SEC's contemporaneous expectations that registration statements would encompass *all* the selling shareholders' shares – regardless of whether *some* might be exempt from registration under another rule.

Consequently, Section 11 requirements apply to direct listings, in accordance with the SEC's intent. The SEC's intent is demonstrated by the history, structure, and function of direct listings:

History. The relevant regulatory history confirms that the SEC consistently required that a selling

shareholder registration statement be on file for direct listings.

In 2008, the New York Stock Exchange (NYSE) first requested SEC approval of rule changes which would allow for a "direct floor listing." *See* Order Approving Proposed Rule Change To Determine That a Company Meets the Exchange's Market Value Requirements by Relying on a Third-Party Valuation of the Company, Exchange Act Release No. 34-58550, 73 Fed. Reg. 54442-01 (Sep. 19, 2008) (the "2008 Order"). NYSE explained that it had been approached by several private companies that had "not had any prior public market for their common stock" but wished to facilitate the resale of privately placed shares (not for purposes of raising capital, e.g., as through an IPO). *Id.* at 54442. NYSE proposed amending sections of its internal rules so that it could:

> on a case by case basis, exercise discretion to list a company whose stock is not previously registered under the Exchange Act, where such company is listing, without a related underwritten offering, *upon effectiveness of a selling shareholder registration statement registering only the resale of shares sold by the company in earlier private placements.*

Id. at 54443 (emphasis added). The SEC approved this proposed rule change and notably made no exceptions for when a "selling shareholder registration statement" would apply (i.e., whether or not some shares were technically exempt under Sections 3 or 4 of the Securities Act or Rule 144). The SEC highlighted the important public interest considerations that undergirded its decision. *Id.* at 54443-44 (discussing the need to "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . [and] to protect investors and the public

interest"). The final NYSE rule also required registration statements without exception or qualification. *See* NYSE Rule 102.01B n. E.

In 2017 and 2018, the SEC held additional proceedings on direct listings, which featured considerably more back-and-forth and confirmed the SEC's insistence that a selling shareholder registration statement pursuant to the Securities Act must be on file. *See* Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650-01 (Feb. 8, 2018) ("2018 Order"). Initially, in mid-2017, NYSE had proposed a new direct listing method that would have *eliminated* the requirement that all shares be directly listed only upon effectiveness of a selling shareholder registration statement. Instead, the NYSE's latest proposal "would have allowed a company to list immediately upon effectiveness of an *Exchange Act* registration statement only without any concurrent IPO or Securities Act [] registration." *Id*. at 5651 n.11 (emphasis added).

That did not sit well with the SEC. In its order instituting proceedings to determine whether to approve or disapprove NYSE's proposed rule change, the SEC provided notice of the grounds for disapproval under consideration pursuant to Section 19(b)(2)(B) of the Exchange Act, noting that NYSE was proposing to adopt listing standards that would permit, "for the first time, the listing on the Exchange of a company immediately upon effectiveness of an Exchange Act registration statement for the purpose of creating a liquid trading market without any concurrent Securities Act registration." SEC Release No. 81640 (Sept. 15, 2017), 82 Fed. Reg. 44229, 44231 (Sept. 21, 2017). In light of these concerns, the SEC specifically

sought public comment on why NYSE's change could be problematic:

> 1. Would a direct listing based only on an Exchange Act registration without prior trading and Securities Act registration present unique considerations, including with respect to the role of various distribution participants, the extent and nature of pricing information available to market participants prior to the commencement of trading, and the availability of information indicative of the number of shares that are likely to be made available for sale at the commencement of trading? Would these considerations raise any concerns, including with respect to promoting just and equitable principles of trade, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest?
>
> 2. To what extent would a direct listing impact the ability of the DMM [Designated Market Maker] to facilitate the opening (or otherwise fulfill its obligations as a DMM) on the first day of trading of a security listed only with an Exchange Act registration? To the extent there would be an impact, please identify it and explain its significance. To what extent would any such impact be mitigated by the proposed requirement that the DMM consult with a financial adviser to the issuer in order to effect a fair and orderly opening of the security?

Id. at 44232.

The regulatory process went on for several more months. NYSE eventually amended its proposed rule change to reinstate the requirement that a direct

listing was permissible with a selling shareholder registration statement. *See* 2018 Order at 5651 n.11. Only then did the SEC approve the proposal. The SEC stressed that its approved method would, *inter alia*, provide "assurance that the company's market value supports listing on the exchange . . . . thereby protecting investors and the public interest," consistent with federal securities law. *Id.* at 5654-55; *id.* at 5653.

Structure. The analytic structure of the SEC's decisions on direct listings suggests that the requirement of a selling shareholder registration statement applies to *all* shares. SEC orders and materials on direct listings do not draw a distinction between registered and unregistered shares, a distinction that Petitioners seek to superimpose here. Quite the contrary: across many pages of the 2008 and 2018 Orders, in each the SEC mentions the word "unregistered" precisely once, in the context of the company's overall "market value."[7] This reflects the SEC's assumption that a selling shareholder registration statement, as it is used in this context, would apply to *all* shares.

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[7] 2008 Order at 3 (NYSE "will have the discretion to determine that the company has met the applicable market value requirements by attributing a market value to the company equal to the lesser of: (i) the value calculated based on an independent third-party valuation of the company ("Valuation"); and (ii) the value calculated based on the most recent trading price of the company's common stock in a trading system for *unregistered* securities operated by a national securities exchange or a registered broker-dealer") (emphasis added); 2018 Order at 4-5 (similarly discussing "the most recent trading price for the company's common stock in a trading system for *unregistered* securities ") (emphasis added).

The structure and content of selling shareholder registration statements for direct listings also mirror this assumption. These statements often examine company-wide metrics, such as the total value of all shares. However, the statements do not typically separate or differently analyze registered versus unregistered shares. Likewise, the statute that sets out the required contents of Securities Act registration statements, 15 U.S.C. § 77aa, does not require such a distinction either. Rather, the statute speaks about the financial health of the company writ large and refers repeatedly to "the security to be offered" with no further specification.

Slack's 2019 registration statement bears this out too. Over the course of nearly 400 pages, the registration statement describes the total value, overall risks, and aggregate finances of the company, and the nearly 200-page prospectus addresses the ownership, sale, plan of distribution, and the risks associated with the purchase and sale of Slack's "Class A common stock" as a whole. The prospectus makes disclosures regarding Class A common stock that is or may become exempt under Rule 144 where it must. *See, e.g.,* Form S-1 Registration Statement Under the Securities Act of 1933, Slack Technologies Inc., Registration No. 333 -- (Apr. 26, 2019), https://www.sec.gov/Archives/edgar/data/1764925/000162828019004786/slacks-1.htm, at pp. 49, 51 (discussing ownership of exempt shares by both "Registered" and "other existing stockholders"); *id.* at p. 152 (discussing possible sales of exempt common stock); *id.* at p. 164 (discussing exempt shares eligible for future sale).

Function. In practical terms, the SEC expected that *all* shares sold pursuant to a direct listing are functionally interconnected with – if not dependent

upon – the required registration statement. Indeed, that was the entire point of mandating that a company put a registration statement on file in the first place. *Supra* p. 11 (discussing investors' reliance interest).

The functional connection is bolstered by the fact that there is no way for investors to ascertain – in a given transaction or on the face of stock certificates – whether the shares they are buying are registered or unregistered. Even if investors specifically asked their broker to try to determine this information, it would not be accessible. For a host of technical and economic reasons detailed in other amicus briefs, *see, e.g.*, Br. of Institutional Investors as *Amici Curiae*, unregistered and registered shares are often thoroughly commingled. In the alternative, if the Court holds that Section 11 and 12 only apply to registered securities, and if it holds that the direct listing rules allow the sale of unregistered shares, then the Court should allow a form of burden-shifting. Namely, where a public offering of newly issued shares (registered shares) is combined with sales by insiders (of unregistered shares), courts should generally assume the plaintiff bought at least some registered shares. The burden should then shift to the defendant to prove otherwise. Such a burden shifting framework would be reasonable here, s*ee generally* Br. of Evidence Scholars as *Amici Curiae*, and typical in the securities context, *see, e.g.*, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement Sys.*, 141 S. Ct. 1951, 1958-59 (2021); *Haliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267-68 (2014).

By contrast, Petitioners suggest that investors would have to figure out what type of share they were purchasing (registered or unregistered) before choosing whether to rely upon information contained in public disclosures. That is neither practicable nor

what the SEC expected in its 2008 or 2018 actions – nor what the Congress could have intended in 1933.

* * *

All told, Petitioners advance a markedly different view of the meaning of Sections 11 and 12 and the effects of direct listings, which could essentially transform the Securities Act into an opt-out regime. Respondent's merits brief and other *amicus* briefs rebut these views in detail. As former leaders of the SEC, undersigned *amici* stress that Petitioners' theory would impede the application of the Securities Act to various new offering forms, beyond the classical IPO, that are growing in popularity and consequential to public markets. In sum, this would make it considerably harder to accomplish the SEC's statutory mandate. It could also have a chilling effect on future SEC rulemakings which balance innovative new methods with the enduring efficacy of the Securities Act. However the Court decides this particular controversy, *amici* respectfully recommend it proceed carefully on the broader issue of how to distinguish (or trace) registered versus unregistered shares.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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